(16)

No. 95-210-CFX
Status: GRANTED

Title: Holly Farms Corporation, et al., Petitioners
v.
National Labor Relations Board, et al.

Docketed:
August 4, 1995

Court: United States Court of Appeals for
the Fourth Circuit

Counsel for petitioner: Roberts III,Charles P.

Counsel for respondent: Solicitor General, James,J. David

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Entry	Date	Note	Proceedings and Orders
1	Aug 4 1995	G	Petition for writ of certiorari filed.
2	Aug 4 1995		3 separate vols. of appdx. to petition for a writ of certiorari filed.
4	Aug 31 1995		Order extending time to file response to petition until October 6, 1995.
5	Aug 31 1995		Brief amicus curiae of National Broiler Council filed.
6	Sep 5 1995		Brief of respondents Chauffeurs, Teamsters and Helpers, et al. in opposition filed.
7	Oct 6 1995		Brief of respondent NLRB in opposition filed.
8	Oct 18 1995		DISTRIBUTED. November 3, 1995 (Page 1)
9	Nov 6 1995		Petition GRANTED. limited to Question 5 presented by the petition.
			**********
10	Dec 5 1995		Record filed.
		*	Original National Labor Relations Board agency record (2 BOXES)
11	Dec 14 1995		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 21, 1996. (2ND CASE
15	Dec 20 1995		Brief amicus curiae of National Broiler Council filed.
12	Dec 21 1995		Joint appendix filed.
13	Dec 21 1995		Brief of petitioners Holly Farms Corporation filed.
14	Dec 21 1995		Brief amici curiae of American Farm Bureau, et al. filed.
16	Dec 21 1995		Brief amicus curiae of California Agricultural Labor Relations Board filed.
17	Dec 21 1995		LODGING consisting of 12 copies of Volume 74 of the American Journal of Agriciultural Economics submitted by counsel for amicus American Farm Bureau.
18	Dec 22 1995		CIRCULATED.
19	Jan 25 1996	X	Brief of respondent Unions filed.
20	Jan 25 1996	X	Brief of respondent National Labor Relations Board filed.
21	Feb 7 1996		Record filed.
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No. 95-210

Supreme Court, U.S.
FILED
AUG 4 1995

In The Supreme Court Of The United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391, 29, 71, 355, 592, 657, 988, AND ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a purchaser of the stock of an ongoing corporation, solely by virtue of its stock ownership interest, become a successor under NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), to the employing corporation's bargaining obligation with an existing union at the time of the stock purchase?

2. Does a parent corporation that makes a lawful economic decision to discontinue its unionized subsidiary's transportation methods and to integrate the subsidiary's transportation operations with the parent's much larger and fundamentally different nonunion transportation operations have a right under NLRB v.

Burns International Security Services, Inc., 406 U.S. 272 (1972), (a) to establish the initial terms and conditions on which employment in the newly integrated transportation division will be offered to the subsidiary's unionized employees and (b) to decline to recognize the union as the representative of the employees who were formerly employed by the subsidiary?

3. When an employer lawfully makes a fundamental managerial decision under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), to discontinue the economically unprofitable transportation methods utilized in its unionized transportation operations and to integrate those operations and employees into

the employer's much larger and fundamentally different nonunion transportation operations, are the terms and conditions of employment in the newly merged operation part of the decision and not subject to mandatory bargaining? or are they merely part of the effects of the decision and a mandatory subject of bargaining?

4. If an employer integrates a subsidiary's unionized operation with its own much larger nonunion operation, may the National Labor Relations Board award reinstatement and back pay to employees of the subsidiary who willfully refuse to accept employment under the terms and conditions of employment in the larger merged operation?

5. Are chicken catchers, fork-lift drivers, and live-haul drivers of a vertically integrated poultry producer considered agricultural employees under Section 2(3) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 152(3) (1973)?

Parties to the Proceeding

The parties before this Court are those set forth in the caption.[1]

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[1] Tyson Foods, Inc., is involved in a joint venture and/or partnership with Trasgo, S.A. DE C.V.; Offshore Systems, Inc.; Aleutian Fuel Services; Ucluelet Seafood Processors; Universal Plan Investments; and Shanghai Ocean Wealth Products Corporation. Tyson Foods, Inc., was the parent company of Holly Farms, Inc. There are no other parent companies or non-wholly-owned subsidiaries.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The National Labor Relations Board issued its order on May 28, 1993. Said order is reported at 311 N.L.R.B. 273 (1993). (A copy is reproduced in the appendix to this petition beginning at page A-79.) The United States Court of Appeals for the Fourth Circuit issued its decision on March 10, 1995. Said decision is reported at 48 F.3d 1360 (4th Cir. 1995). (A copy is reproduced in the appendix to this petition beginning at page A-1.) Petitioner's timely petition for rehearing was denied on May 9, 1995. (A copy of this order is reproduced in the appendix to this petition beginning at page A-936.)

STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on March 10, 1995. A timely petition for rehearing was filed on April 14, 1995. On May 9, 1995, the court of appeals denied the petition for rehearing. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1993).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in the appendix at pages A-940-43. These provisions are 29 U.S.C. § 152(3) (1973), 29 U.S.C. § 157 (1973), 29 U.S.C. § 158(a) (1973), 29 U.S.C. § 159(a) (1973), and 29 U.S.C. § 203(f) (1978).

STATEMENT OF CASE

For many years, Petitioner Holly Farms ("Holly") has been engaged in the production and marketing of poultry products at various facilities throughout the United States, including Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas. Its operations have included hatcheries, live- haul operations, feed mills, feed haul operations, maintenance facilities, processing plants, and transportation operations. (A-227-29.)

A. The Transportation Operations

In early January 1989,[2] Chauffeurs, Teamsters and Helpers, Local

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[2] All dates are 1989 unless otherwise indicated.

Union Nos. 29, 71, 355, 391, 592, 657, and 988 (hereinafter collectively "the Union") filed a representation petition with the National Labor Relations Board ("NLRB" or "Board") seeking to represent the drivers and yardmen employed by Holly in its long haul transportation operations at Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas. The NLRB conducted a secret-ballot election, which resulted in the Union's being certified on March 24 as the collective bargaining representative for these transportation employees. (A-229, A-233.)

On April 11, Holly began negotiating with the Union for a collective

bargaining agreement to cover the long haul transportation employees. The parties stipulated that these negotiations were conducted in good faith. (A-236, A-597-98.)

While these negotiations were continuing, Petitioner Tyson Foods, Inc. ("Tyson"), was negotiating to purchase the stock of Holly. Tyson, like Holly, was engaged in the production and marketing of poultry products at various locations throughout the United States. Its operations included hatcheries, live-haul operations, feed mills, feed haul operations, maintenance facilities, processing plants, and transportation operations.

Although Tyson and Holly were engaged in similar businesses, the

transportation operations of the two companies were fundamentally different. Holly's long haul transportation operation existed primarily to deliver Holly products to Holly customers. The long haul operations at Holly operated on a cost basis and were largely controlled by the production schedule at their respective processing plants. (A-667-68.) Each plant maintained a dispatch office from which loads were assigned and trucks were dispatched. Drivers and their trucks were dispatched on a first-in, first-out basis, and an "extra board" was maintained from which additional drivers could be selected when needed to haul a load or team up with another driver to haul a load on a trip that would re-

quire a single driver to exceed his allotted drive time. (A-666, A-669-70.)

Although Holly tried to lower its transportation costs by securing backhaul business, it was largely unsuccessful. Approximately 50 percent of Holly's return miles were "deadhead," or empty, miles, resulting in an annual estimated loss of $5 million to $6 million. (A-73-74.)

Tyson's transportation operations were not represented by any union and were much larger than Holly's, consisting of approximately 550 drivers compared to Holly's 220 drivers. (A-666-67.) In contrast to Holly's transportation system, Tyson Transportation operated as an independent, profit-seeking enterprise.

Tyson hauled only 35 percent of Tyson's products, with the balance being hauled by common carriers, allowing Tyson to limit its hauling to areas where it had established backhaul customers, which created greater backhaul revenues. Tyson's empty mileage ratio was between 7.5 percent and 12 percent, and Tyson Transportation has generated a profit every year since 1980. (A-117-18, A-601, A-667.)

Unlike Holly, Tyson operated as a common carrier, and each trip made by a driver consisted of multiple legs in order to generate backhaul revenue. Whereas Holly drivers would typically be gone three to four days at a time, Tyson drivers were frequently gone for ten days to two

weeks at a time. Tyson's fleet manager concept enabled trucks to be coordinated through a central location rather than being dispatched from each plant. (A-117-18, A-669-83.)

On July 18, Tyson purchased the stock of Holly. When Tyson purchased Holly's stock, it made no immediate changes in Holly's transportation division. Holly continued to operate as a separately identifiable company. For two months after the acquisition, nothing changed for the Holly transportation employees, all of whom continued on the Holly payroll, under the same terms and conditions of employment. (A-101.) The parties stipulated that during this two-month period, Holly continued to engage in

meaningful negotiations with the Union for a contract. Agreements were reached on some additional issues, but no final contract was achieved. (A-94-99, A-598-628.)

On September 11, Tyson made a decision to discontinue the Holly methods of transportation, which were continuing to lose money, and to merge these operations with Tyson's transportation operations under the Tyson method of operations. It was further decided that all Holly transportation employees would be offered employment in the newly integrated operation under Tyson's established terms and conditions of employment. (A-617-18.)

On September 12, Holly informed the Union that its transportation

operations would cease to exist on September 22 and that Holly drivers would be receiving offers of employment with Tyson Transportation, to be effective on September 22. Holly declined to bargain over the integration decision, but offered to bargain over the effects of the integration. Holly, however, took the position that the Tyson terms and conditions of employment were part of the integration decision and not part of the effects of that decision. The Union rejected this offer. (A-97-99.)

Concurrent with the announcement to the Union, Holly notified all drivers that Tyson was taking over the transportation operation and advised the drivers that they were being offered jobs by Tyson. (A-99.)

The Union's attorney recommended that the employees accept Tyson's offer of employment. (A-779.) All but 47 of Holly's 220 transportation employees accepted employment with Tyson. These 47 drivers declined to accept employment under the Tyson terms and conditions of employment. (A-631-36.)

The integration required extensive changes to Holly's operations. Pursuant to the merger, the Interstate Commerce Commission operating authority of Holly was combined with that of Tyson and Holly's motor carrier number was discontinued. (A-681.) Tyson's fleet manager concept was implemented, and the use of plant-based dispatchers was discontinued. The Tyson computer system

was implemented for dispatching trip information, and the Tyson routing system was implemented. (A-670, A-674-75.)

The integration involved an immediate integration of drivers and product. Former Tyson drivers began delivering Holly product, and former Holly drivers began delivering Tyson product. (A-674, A-689-90.) The former Holly drivers began driving Tyson trip patterns, which involved 10 to 14 day trips. (A-680-82.)

A temporary terminal was established by October 1, and a permanent terminal location near the Wilkesboro airport was suitably renovated and occupied by early December. All hauling operations for the Monroe, Wilkesboro, Glen Allen, Harrisonburg,

and Temperanceville facilities have since been coordinated from the central Wilkesboro terminal in accordance with the Tyson fleet manager concept. (A-700-04.)

Tyson assumed control of all employment and labor relations policies that had previously been administered by Holly. (A-696.) Drivers began wearing Tyson uniforms and were subject to Tyson work rules and a Tyson safety program. (A-691-96.) The Tyson payroll system was implemented, and a Tyson Sperry Univac computer system was put in place at Wilkesboro. (A-705-07.)

Yard employees, who became unnecessary under the Tyson operating system, were assigned to other jobs in the processing plant and were

transferred to the plant payroll. (A-683-86.)

Based on its conclusion that the former Holly transportation bargaining unit had been destroyed by the integration, Tyson declined to recognize or bargain with the Union in the newly integrated transportation operation. On October 1, approximately 40 former Holly transportation employees who had accepted employment with Tyson established picket lines and went on strike to protest the changes made by Tyson and its failure to recognize the Union. (A-779-85.)

The Union filed unfair labor practice charges with the Board, and the Board subsequently issued a complaint alleging, inter alia, that Tyson became a successor to Holly's

bargaining obligation in the transportation unit at the time of the July 18 stock purchase, that Tyson unlawfully failed to bargain over the decision to integrate the two transportation operations and its effects, that Tyson unlawfully discharged the 47 drivers who had declined Tyson's offer of employment, that Tyson unlawfully withdrew recognition from the Union, and that the strike that began on October 1 was an unfair labor practice strike.

B. The Live-Haul Unit

The Union also conducted separate organizing efforts among the employees of Holly's live production department in Wilkesboro, North Carolina. A representation petition was filed with the Board on February 16.

(A-233.) Over the objection of Holly that the unit included agricultural employees not covered by the NLRA, 29 U.S.C. § 151, et seq., the Board approved an election in the following bargaining unit:

> All live-haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina and feed haul, feed mill and service center employees employed at the facility of the Respondents located in Roaring River, North Carolina, excluding all office employees, guards and supervisors as defined in the Act.

(A-211-12.)

On July 27 an election was held in which the Union failed to receive a majority of the valid votes cast. The Union filed unfair labor practice charges with the Board alleging that Holly violated the Act by various acts committed during the Union's

organizing activities. The Board subsequently issued a complaint alleging that Holly had committed various violations of the Act.

C. The NLRB Proceedings

The NLRB acquired jurisdiction under Sections 10(a) and (b) of the NLRA, 29 U.S.C. §§ 160(a) & (b) (1973). Pursuant to Section 10(c) of the Act, 29 U.S.C. § 160(c) (Supp. 1995), a hearing was held before Administrative Law Judge ("ALJ") Robert M. Schwarzbart beginning on November 27, 1989, and concluding on May 2, 1990.

The ALJ issued his decision on March 12, 1992. He concluded, inter alia, that Tyson became a successor to Holly's bargaining obligation on July 18; that Tyson unlawfully failed

to bargain over the decision to integrate the two transportation operations and its effects; that Tyson unlawfully unilaterally imposed its terms and conditions of employment on the former Holly drivers, thereby unlawfully constructively discharging the 47 drivers who rejected these terms; that Tyson unlawfully withdrew recognition from the Union; and that the strike of October 1 was an unfair labor practice strike. The ALJ also concluded that a bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575, reh'g denied, 396 U.S. 869 (1969), should be issued in the live-haul bargaining unit where the Union had lost an election. (A-206-935.)

Exceptions to the ALJ's decision were filed with the Board. On May

28, 1993, the Board issued its decision and order. The Board affirmed in part and reversed in part. The Board agreed with the ALJ that Tyson became a successor to Holly's bargaining obligation on July 18. (A-105-14.) The Board, however, concluded that the decision to integrate the two transportation divisions involved a fundamental change in scope and direction within the meaning of First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), which change Tyson had a right to make without bargaining with the Union. (A-115-21.) Nevertheless, the Board held that issues such as work locations, schedules, and pay systems were part of the effects of the decision rather than part of the decision

itself and that Tyson unlawfully imposed these matters on the Holly drivers. (A-121-124.)

The Board rejected the ALJ's conclusion that the 47 drivers who declined employment under Tyson's terms were constructively discharged. Instead, the Board held that these employees were actually discharged by Tyson. (A-125-26.) The Board agreed with the ALJ that Tyson unlawfully withdrew recognition from the Union (A-126-31) and that the strike of October 1 was an unfair labor practice strike. The Board also agreed that a Gissel bargaining order should issue in the live-haul unit. (A-134-56.)

D. The Court Of Appeals Proceedings

On June 7, 1993, Petitioners timely filed a petition for review with the United States Court of Appeals for the Fourth Circuit. On July 19, 1993, the Board filed a cross-application for enforcement of its order. The court of appeals acquired jurisdiction pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. §§ 160(e) & (f) (1973). These provisions specify no time in which a party must seek review of a Board order.

On March 10, 1995, a panel of the court of appeals enforced the Board's order. Judge Niemeyer dissented in part. Judge Niemeyer concluded that "the majority opinion significantly misconstrues the law of

successorship liability when it refuses to recognize the existence of two corporate entities for the two months after the stock purchase by Tyson." (A-55.)

Judge Niemeyer was of the opinion that because Holly's transportation operations continued unchanged for two months after Tyson acquired the stock of Holly, Tyson was not a successor to Holly's bargaining obligation at the time of the stock purchase. According to Judge Niemeyer, successorship principles did not come into play until September, when Tyson discontinued Holly's transportation methods and integrated the Holly transportation operations into the much larger Tyson transportation unit. Tyson's offer of employment

under Tyson's terms was lawful. Moreover, because the integration of the two transportation divisions had destroyed the former Holly bargaining unit, Tyson had no obligation to recognize and bargain with the Union. Thus Judge Niemeyer would have denied enforcement of these aspects of the Board's decision. (A-63-78.)

Judge Niemeyer also would have denied enforcement to the Gissel bargaining order in the live-haul unit. It was his opinion that the chicken catchers, forklift drivers, and live-haul drivers were agricultural employees exempt from coverage by Section 2(3) of the Act, 29 U.S.C. § 152(3) (1973). (A-57-61.)

Petitioners now file this Petition For Certiorari.

REASONS FOR GRANTING THE WRIT

This case presents important issues regarding the application of the successorship doctrine, established by the Court in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), to stock acquisitions, parent-subsidiary relationships, and integration decisions. This specific issue has never been addressed by the Court. The Fourth Circuit's decision is inconsistent with the decisions of all other circuits that have considered the issue. "Because of the importance of the successorship issue in labor law, and because of [the Court's] interest in the rules developed by the Board for successorship cases," the Court should grant certiorari. Fall River

Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36 (1987).

This case also presents an important issue regarding the scope of the Court's decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). In particular, where is the line drawn between a decision and its effects? The opinions of the Board and the court of appeals have emasculated Tyson's conceded right under First National Maintenance to make a decision to integrate the two transportation operations by characterizing certain fundamental aspects of the decision as part of the effects of the decision.

A third important issue raised by this petition concerns the Board's

authority to treat employees as discharged employees entitled to reinstatement and back pay when those employees voluntarily reject terms of employment that are later determined to be unlawfully imposed unilaterally. The decision of the Board and the court of appeals creates the anomalous result that employees who voluntarily reject unlawfully imposed conditions of employment are entitled to reinstatement and back pay from the date they reject the terms, while employees who strike over the very same terms are entitled to reinstatement and back pay only after they offer unconditionally to return to work under the same terms that were unlawfully imposed.

Finally, this case raises an issue of the scope of the agricultural exemption and its application to chicken catchers, forklift drivers, and live-haul drivers. The Fourth Circuit's decision is inconsistent with the Fifth Circuit's decision in Coleman v. Sanderson Farms, Inc., 629 F.2d 1077 (5th Cir. Unit A 1980), reh'g denied, 644 F.2d 34 (5th Cir. Unit A Apr. 1981), and the Ninth Circuit's decision in NLRB v. Victor Ryckebosch, Inc., 471 F.2d 20 (9th Cir. 1972).

A. The Fourth Circuit's Decision Is In Conflict With The Court's Decisions And The Decisions Of Other Courts Of Appeals Regarding Successorship.

The Fourth Circuit, with one judge dissenting, held that "[a]lthough the Supreme Court has yet to

decide the question, the policies behind the labor laws compel the finding that a new stockowner acquires the duty to bargain with an existing union at the time of a stock transfer." (A-21.) While it is true that the Court has not yet directly decided the issue, the Fourth Circuit's opinion is in conflict with the opinion of every other circuit court that has addressed the issue and is inconsistent with the principles of successorship developed by the Court.

In NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), Wackenhut had provided security service for Lockheed for five years under a service agreement with Lockheed. Wackenhut's guards were

represented by a union and were covered by a collective bargaining agreement. Shortly after Wackenhut and the union entered into a collective bargaining agreement, Wackenhut's contract with Lockheed expired and a new contract was put up for bid. Burns was awarded the bid and replaced Wackenhut as Lockheed's security service. Burns began operations with 42 guards, 27 of whom were former Wackenhut guards. Burns declined to recognize either the union or the collective bargaining agreement.

The Court held that Burns had an obligation to recognize and bargain with the union inasmuch as "[i]n an election held but a few months before, the union had been designated

bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in the identical unit." 406 U.S. at 278. The Court was careful, however, to differentiate the following scenario: "It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." Id. at 280 (footnote omitted).

Although the Court held that Burns had an obligation to recognize and bargain with the union, it concluded that Burns had no obligation to adopt the collective bargaining

agreement in effect between Wackenhut and the Union. 406 U.S. at 287-88.

Finally, the Court held that Burns was free to impose its own initial terms and conditions of employment on the employees:

> It is difficult to understand how Burns could be said to have changed unilaterally any preexisting term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

406 U.S. at 294 (emphasis in original).

Decisions of the Court subsequent to Burns have recognized that the Burns principles apply in other contexts, including "mergers, consolidations, and purchases of assets." Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973); see Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) (assets purchase); Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974) (assets purchase).

The Court has never addressed the applicability of Burns to a stock purchase. Prior to the decision in this case, however, the courts of appeals that had considered the issue had uniformly held that a mere stock transfer, unaccompanied by any significant operational changes affect-

ing the bargaining unit employees, did not effectuate a change in the employer and thus did not trigger the application of Burns' successorship principles.

In NLRB v. Miller Trucking Service, Inc., 445 F.2d 927 (10th Cir. 1971), a case that predated Burns, Miller Trucking's owner sold all of his stock to Tulsa Crude Oil Purchasing Company. Miller Trucking, however, continued to operate in substantially the same manner as it had prior to the stock sale. At the time of the sale, the union had neither been certified by the Board nor recognized by the employer, and there was no collective bargaining agreement. Although it found no substantial evidence of unfair labor prac-

tices, the Tenth Circuit held that the stock transfer "did not change the corporate entity" and "[t]he employing entity at all times was Miller Trucking Service, Inc." 445 F.2d at 930.

In Miami Foundry Corp. v. NLRB, 682 F.2d 587 (6th Cir. 1982), Miami Foundry's employees had been represented by a union for 30 years, and a collective bargaining agreement was in effect. During the term of the agreement, 59 percent of Miami's stock was sold to A. C. Williams Company. One week prior to the stock sale, Miami terminated its employees without bargaining with the union, shut down its foundry, and closed its doors. Immediately after the stock sale, it reopened, but rehired only

six of its former employees, refused to honor the contract, and refused to recognize the union.

The Sixth Circuit did not discuss Burns, and it is clear that the court viewed successorship principles as being inapplicable to a mere stock transfer absent a finding "that the new company completely substituted for the old, and that the old was no longer in existence." 682 F.2d at 589. The court explained: "Miami never ceased as a business entity and its obligations under the 1977 agreement, therefore, never ceased." Id.

In UFCW, Local 152 v. NLRB, 768 F.2d 1463 (D.C. Cir. 1985), the union had represented certain employees of Spencer Foods for many years. Spencer and the union had been par-

ties to a series of collective bargaining agreements. Upon the expiration of the most recent collective bargaining agreement, Spencer closed the unionized plant and subsequently sold all of its stock to Land O' Lakes. Eighteen months after Spencer closed, it reopened under the ownership of Land O' Lakes. The court rejected the Board's conclusion that a successorship occurred when Spencer sold its stock to Land O' Lakes and reopened. In holding that Spencer (not Land O' Lakes) had a continuing obligation to recognize the union, the court explained:

> It is worth noting, at the outset, that in this case, the same corporate entity that existed prior to the Spencer plant closing did continue to exist after the reopening of the Spencer plant, notwithstanding the

> transfer in the ownership of the corporation's stock, and notwithstanding the changes in the corporation's status and business operations.

768 F.2d at 1471 (emphasis in original).

In Esmark, Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1989), Swift's employees were represented by the union and were covered by a collective bargaining agreement. When the union refused to consider mid-term contractual modifications, Swift's stock, through a multitude of complicated transactions, was conveyed to Esmark, which in turn conveyed the stock to a subsidiary, New Sipco. New Sipco declined to recognize the union or the collective bargaining agreement and hired its own employees. The Seventh Circuit held that

the various transactions were nothing more than a stock sale, that there was no change in the employing entity, and that the successorship doctrine was "of no relevance." 887 F.2d at 751. Thus the employer had a continuing obligation to recognize both the union and the collective bargaining agreement.

Although the factual situations have varied significantly, the decisions of the Sixth, Seventh, Tenth, and District of Columbia Circuits described above are uniform in their espousal of the principle that a mere stock transfer, absent some accompanying substantial change in operations affecting the employees, does not make the new stockowner a successor to the existing employer's labor

obligations[3]. Those obligations remain with the existing employer. The decisions of these courts are consistent with the Court's holding that "[t]he insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception." NLRB v. Deena Artware, Inc., 361 U.S. 398, 402-03 (1960) (citation omitted).

It is undisputed in this case, and the Board found, that "for 2 months following the purchase, nothing changed for the former Holly Farms employees, all of whom were retained on the payroll under their

---

[3] Prior to the decision in this case, the Fourth Circuit had also held that a mere change in stock ownership did not trigger application of successorship principles. EPE, Inc. v. NLRB, 845 F.2d 483 (4th Cir. 1988).

existing wages, hours, and terms and conditions of employment." (A-101.) Holly remained a viable corporate entity and continued to bargain in good faith with the Union. The Board's legal conclusion, enforced by the panel majority, that Tyson became a successor to Holly's bargaining obligation on July 18, when it acquired Holly's stock, is erroneous as a matter of law. See generally Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974) (continued viability of original employer with which union could deal was reason for finding no successorship).

As Judge Niemeyer recognized in his dissent from the panel's opinion, there can be no successorship unless

there is "a change of employer so that one supplants the other. Obviously, if the previous corporation continues in its existing form as the employer, no succession occurs." (A-65.)

Tyson is not suggesting that successorship principles never came into play. In September, when Tyson discontinued the Holly transportation methods and integrated the two transportation operations, Holly disappeared as the employer of the drivers and yardmen and Tyson became their employer. Tyson, as a new employer, had a right under Burns to establish its own terms and conditions of employment.[4] Thus its offer

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[4] The Board's conclusion that Tyson became a successor on July 18, at the time of (continued...)

of employment to Holly drivers under Tyson's terms was not a unilateral change.

Moreover, the integration completely changed the manner in which Holly and its employees had previously operated. The Holly employees were integrated into the much larger Tyson unit and lost any separate identity. Thus Tyson did not acquire any bargaining obligation with the Union.

Tyson and Holly respectfully request that the Court grant this petition and that it resolve the conflict among the circuits on this im-

---

[4](...continued)
the stock purchase, appears to be a result-oriented conclusion designed to find Tyson's imposition of its own terms and conditions of employment unlawful. A successor must make any desired changes in terms and conditions of employment at the time of hiring or else it loses that right.

portant question of federal labor law.[5]

B. The Fourth Circuit's Decision Is Inconsistent With First National Maintenance.

In First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677 (1981), the Court held that an employer has a right to make a decision to close down a particular operation without bargaining with the union that represented its employees because the decision involved "a change in the scope and direction of the enterprise" and was "'not in [itself] primarily about conditions of employment . . . .'" Citation omitted. The Court emphasized that "Congress

---

[5] It is also highly significant to Petitioners inasmuch as their liability has been estimated publicly by the Union to exceed $10 million.

had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." 452 U.S. at 676.

In First National Maintenance, the Court distinguished between decision bargaining and effects bargaining. Although the employer had no duty to bargain over the partial closing decision, it had a duty to bargain over the effects of that decision. 452 U.S. at 677 n.15, 681-82.

This case raises the important issue, never directly addressed by the Court, as to where the line is drawn between a decision and its effects. The Board held that Tyson's

decision to integrate the two transportation operations involved a fundamental change in the scope and direction of the business and was one over which there was no duty to bargain. The Board explained:

> [T]he integration process involved structural and operational changes designed to make the former Holly Farms transportation division operate like a common carrier. Additionally, implementation of the integration decision required the expenditure of capital. For these reasons, we find that the burden on the conduct of the business outweighs any benefit that might be gained from the Unions' participation in the decision and, therefore, that the September 12 integration decision was not a mandatory subject of bargaining.

(A-119-20 (footnotes omitted).) The Board noted that the structural and operational changes included requir-

ing "the former Holly Farms drivers, who had previously followed established routes, . . . to make multiple-leg trips in order to generate backhaul revenue." The capital expenditures included building new central terminals. (A-120.)

Although it concluded that Tyson had a right to make the decision to integrate, the Board held that Tyson was obligated to bargain over the effects. Tyson agrees that it had a duty to bargain over the effects, and it offered to do so. However, the Board's view of the effects of the decision is so broad that it eviscerates the decision itself.

According to the Board, the effects of the decision included "pay, work locations, schedules, and other

terms of employment resulting from the integration." (A-131.) Thus although building new central terminals was one of the capital investments relied upon by the Board to find no duty to bargain over the decision, the Board concluded that Tyson had a duty to bargain over work locations. Although requiring drivers to make multiple-leg routes was a fundamental operational change, the Board asserts that Tyson had a duty to bargain over schedules.

The Fourth Circuit panel and the Board adopted an "inevitable consequences" standard. (A-33, A-122.) Under that standard, any subject that is not an inevitable consequence of the decision is part of the effects. Tyson contends that this standard is

inconsistent with First National Maintenance and effectively emasculates Tyson's acknowledged right to make the integration decision.

The decision to integrate the two transportation operations was much more than a simple combination of two groups of employees. Tyson completely abandoned the Holly method of transportation and all policies and practices associated with it in favor of Tyson's method of transportation and all the policies and practices associated with it. Characterizing Tyson's transportation methods, policies, and practices as mere effects of the integration decision fails to acknowledge the breadth and scope of that decision.

The inevitable consequences standard is far too high. There is very little that can be characterized as inevitable. If an employer closes one facility that operates on 8-hour shifts and transfers the work to a second facility that operates on 12-hour shifts, it would not be inevitable that employees offered employment at the second facility would have to work 12-hour shifts. Presumably, it would be possible to have some employees working 12-hour shifts and others working 8-hour shifts. While such a scenario might be possible, it certainly would not be practical.

Whatever the scope of effects bargaining may be, it certainly does not extend to the very things that constitute the fundamental change in

scope and direction. Although the Court did not define the scope of effects bargaining in First National Maintenance, it did note that effects bargaining would include bargaining over "matters of job security." 452 U.S. at 681. Undoubtedly, effects bargaining includes bargaining over severance pay, supplemental unemployment benefits, and the right to transfer elsewhere with the employer. It should not, however, include bargaining over the terms and conditions of employment that apply after an employee accepts a transfer elsewhere.

Tyson respectfully requests that the Court grant certiorari to define the scope of effects bargaining.

C. The Board May Not Award Reinstatement And Back Pay To Employees Who Willfully Reject Employment.

The Board concluded that the 47 drivers who voluntarily rejected Tyson's offer of employment because the terms were different from those that existed at Holly were unlawfully discharged under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1973), and were entitled to reinstatement and back pay. (A-125-26.) Assuming, arguendo, that Tyson unlawfully unilaterally changed terms and conditions of employment, the Act does not permit employees to willfully reject such terms and later be entitled to reinstatement and back pay.

The Board's conclusion that employees who voluntarily reject em-

ployment because certain terms of employment have been unlawfully imposed are discharged employees entitled to reinstatement and back pay undermines the Act's structured method of dispute resolution. Under the Act, employees who believe that their employer has engaged in an unfair labor practice have two options. One is to file an unfair labor practice charge with the Board. The Board investigates and, if the charge has merit, seeks an appropriate remedy through the Act's remedial provisions. A second option is to engage in a strike in an effort to bring economic pressure upon the employer to correct its actions. Section 7 of the Act specifically protects employees who engage in con-

certed activity for mutual aid or protection. 29 U.S.C. § 157 (1973).

Frequently employees and unions choose both options. They file unfair labor practice charges with the Board and simultaneously strike the employer. Unfair labor practice strikers, however, do not draw back pay from the date the strike began. They are entitled to back pay only <u>after</u> they make an unconditional offer to return to work and the employer refuses to reinstate them. Moreover, unfair labor practice strikers are entitled to reinstatement only if they offer to return to work under the terms and conditions imposed by the employer even though those terms were unlawfully imposed. They are not free to condition their

return on the employer's willingness to alter the terms of employment. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278, reh'g denied, 351 U.S. 980 (1956); Lapham-Hickey Steel Corp. v. NLRB, 904 F.2d 1180, 1187 (7th Cir. 1990).

In this case, the Board has given the 47 employees who rejected Tyson's offer of employment the right to dictate the terms of their employment. The Board's order requires that they be reinstated with full back pay from the date on which they rejected Tyson's offer of employment. The unfair labor practice strikers, however, had not made an unconditional offer to return to work as of the date of the hearing. Thus the Board's order requires Tyson to re-

instate them merely upon their unconditional offer to return to work.

This dichotomy between the unfair labor practice strikers and the employees who rejected employment is illogical. It is also contrary to labor law jurisprudence, which has historically recognized the principle of work now, grieve later. Indeed, the Board has recently observed that "it seems ill advised as a matter of policy to encourage employees to quit their jobs whenever they suffer any unlawful condition, at least if they have avenues for remedying that condition." Lively Elec. Inc., 316 N.L.R.B. No. 87, 148 L.R.R.M. (BNA) 1209, 1211 (1995) (emphasis in original).

Petitioners request that the Court grant certiorari to address this important issue.

D. The Fourth Circuit's Decision Regarding The Status Of Chicken Catchers, Forklift Drivers, And Live-Haul Drivers Is Inconsistent With The Legislative History Of The Agricultural Exemption And With Decisions Of Other Circuits.

The Fourth Circuit, with one judge dissenting, enforced the Board's order imposing a Gissel bargaining order in a unit that included Holly's chicken catchers, forklift drivers, and live-haul drivers. Holly's contention that these employees were agricultural employees excluded from coverage by Section 2(3) of the Act, 29 U.S.C. § 152(3) (1973), was rejected.

In Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 300 n.6 (1977),

the Court noted that "[a]nnually since 1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of 'agricultural laborer' in § 2(3) of the NLRA to § 3(f) of the [Fair Labor Standards Act]." These riders preclude the Board from making any orders concerning bargaining units composed of agricultural laborers.

The Fourth Circuit's decision is directly contrary to the decision of the Fifth Circuit in Coleman v. Sanderson Farms, Inc., 629 F.2d 1077 (5th Cir. Unit A 1980), reh'g denied, 644 F.2d 34 (5th Cir. Unit A Apr. 1981). In Coleman, the court addressed the agricultural status of live-haul drivers and loader operators (forklift drivers) of a verti-

cally integrated poultry processor. The Coleman court rejected the contention that the Court's decision in Bayside precluded a finding of agricultural status and held that the live-haul drivers and loader operators were engaged in agriculture. 629 F.2d at 1081.

The Ninth Circuit has similarly held that live-haul drivers are agricultural employees. NLRB v. Victor Ryckebosch, Inc., 471 F.2d 20 (9th Cir. 1972). Although the Bayside Court cited Ryckebosch as a case involving an "apparent conflict" with Bayside, 429 U.S. at 299 & n.4, Bayside dealt with feedmill drivers, not live-haul drivers. Whereas feed is not an agricultural product, live chickens clearly are. Bayside does

not overrule the Ryckebosch holding with regard to live-haul drivers.

The Eighth Circuit, on the other hand, has held that live-haul drivers are not agricultural employees. NLRB v. Hudson Farms, Inc., 681 F.2d 1105 (8th Cir.) (per curiam), cert. denied, 459 U.S. 1069 (1982); Valmac Indus., Inc. v. NLRB, 599 F.2d 246 (8th Cir. 1979).

Petitioners request that the Court resolve the conflict among the circuits on the agricultural status of live-haul drivers and forklift drivers. Certiorari should also be granted on the status of the chicken catchers (as well as the forklift drivers), because their work is performed exclusively "on a farm" in conjunction with the farming activi-

ties on that farm. Section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(f) (1978). The decisions of the Court, as well as pertinent legislative history, make it clear that all such individuals are agricultural employees. See Maneja v. Waialua Agric. Co., 349 U.S. 254 (1955).

Indeed, Congress added the words "or on a farm" to the FLSA's definition of "agriculture" specifically for the purpose of ensuring that the exemption would include the activities of a nonfarmer that are performed on a farm and that are incidental to the farming operations occurring on that farm. See Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 767 & n.16, reh'gs de-

nied, 338 U.S. 839 (1949) (discussing legislative history).

The proponent of this particular amendment, Senator George McGill stated that the purpose was to exempt "all work done on a farm, so long as it is incidental to agricultural purposes," as well as to exempt "all labor performed in making delivery to market." 81 Cong. Rec. 7888.

Senator McGill's amendment was approved (id.) and was included in the final version of the bill.

It is undisputed that the chicken catchers work on the farms of the independent growers. Nor can there be any doubt that catching chickens is a function that is as incidental to agricultural purposes as is thrashing wheat.

Holly's chicken catchers, fork-lift drivers, and live-haul drivers clearly come within the scope of the agricultural exemption. Petitioners request that the Court grant certiorari on this important issue.

Dated: Greensboro, North Carolina, August 3rd, 1995.

Respectfully submitted,

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95-210

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFERS, TEAMSTERS AND HELPERS, et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Volume One - Appendix to Writ of Certiorari

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Holly Farms Corporation;
Tyson Foods, Inc.
Petitioners,

v.
National Labor Relations
Board,
Respondent,

CHAUFFEURS, TEAMSTERS AND
HELPERS, Local 391, 29,
71, 355, 592, 657, 988,
and all affiliated with
the International Brother-
hood of Teamsters,
Intervenor.

National Labor Relations
Board,
Petitioner,
v.
Holly Farms Corporation;
Tyson Foods, Incorporated,
Respondents,

CHAUFFEURS, TEAMSTERS
AND HELPERS, Local 391, 29,
71, 355, 592, 657, 988
and all affiliated with
the International Brother-
hood of Teamsters,
Intervenor.

No. 93-1710

No. 93-1882

On Petition for Review
and Cross-application
for Enforcement of an Order
of the
National Labor Relations Board.
(11-CA-13184, 11-CA-13267,
11-CA-13520, 11-CA-13619,
11-RC 5583, 11-CA-13487)

Argued: April 12, 1994

Decided: March 10, 1995

Before MURNAGHAN and NIEMEYER,
Circuit Judges, and HARVEY,
Senior United States District Judge
for the District of Maryland,
sitting by designation.

Order enforced by published opinion.
Judge Murnaghan wrote the opinion, in
which Senior Judge Harvey joined.
Judge Niemeyer wrote an opinion con-
curring in part and dissenting in
part.

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OPINION

MURNAGHAN, Circuit Judge:

Holly Farms Corporation and Tyson Foods, Inc. ("Holly Farms" and "Tyson"—collectively, "the Company") have petitioned for review of a decision and order of the respondent, the National Labor Relations Board ("NLRB" or "the Board"), which found that the Company had committed unfair labor practices in violation of §§ 8 (a)(1), (3), and (5) of the National Labor Relations Act ("the Act"), 49

Stat. 449, as amended, 29 U.S.C. §§ 158(a)(1), (3) and (5). *Holly Farms Corp.*, 311 N.L.R.B. 273 (1993). The NLRB has cross-applied for enforcement of its order, and the Chauffeurs, Teamsters and Helpers Local Union Nos. 29, 71, 355, 391, 592, 657, and 988 (collectively, "the Union") have intervened as respondents.

I

Tyson is engaged in the production, processing, and transportation of poultry. Tyson operates production facilities, as well as transportation terminals between Texas and North Carolina. From those terminals, drivers in Tyson's transportation department transport its poultry

products to customers throughout the United States.

As of October 1988, Holly Farms was engaged in the production, processing, and transportation of poultry at its headquarters facility in Wilkesboro, North Carolina, and at other facilities in North Carolina, Virginia, and Texas. At that time, Tyson submitted a bid to purchase Holly Farms' stock.

On July 18, 1989, Tyson acquired a controlling interest in Holly Farms, but Holly Farms continued its existence as a corporate entity. Holly Farms' business operations remained virtually unchanged for about two months. Eventually, Holly Farms announced that Tyson had decided to in-

tegrate part, but not all, of Holly Farms' operations into its own.

In December 1988, while Tyson's bid to purchase Holly Farms' stock was pending, the Union launched organizing campaigns in three separate units of Holly Farms employees. One of those units consisted of production employees at the Wilkesboro facility and elsewhere. The second unit ("the drivers-yardmen unit") consisted of drivers and yardmen at several facilities in Holly Farms' transportation department. And the third unit ("the live-haul unit") consisted of the Wilkesboro facility's live-haul crews and various workers at Holly Farms' facility in Roaring River, North Carolina.

The Board found that Holly Farms committed numerous unfair labor practices during those three organizing campaigns. *See Holly Farms Corp. v. NLRB, supra*. Many of the Board's findings are uncontested here. For example, it is uncontested that, during the Union's organizing campaign in the drivers-yardmen unit, Holly Farms officials, including its President, repeatedly threatened that Holly Farms would eliminate the transportation department and terminate all of its employees if the Union won the election. Even after the Union won the election and was certified to represent the unit, Holly Farms threatened employees with arrest for handing out union literature, and then it actually had three employees

arrested when they distributed union literature in a company parking lot. In addition, the Company unlawfully discharged four pro-union activists in the production employees unit who had asked their co-workers to sign union authorization cards or to support the Union.

The Company does not dispute the above-described unfair labor practices, and the Board's order with respect to those uncontested violations can be summarily enforced. *See NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991). Of those findings that the Company does dispute, some are clearly supported by substantial evidence. Only two of the issues presented in the Company's petition for review merit extended

discussion: (1) whether Tyson violated any duty that it may have had to bargain with the Union regarding the drivers-yardmen unit; and (2) whether the workers in the live-haul unit were "employees" protected by the Act or "agricultural laborers" excluded from the Act's coverage.

II

The Board's findings are conclusive "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). A reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*

Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III

The first question presented is whether Tyson violated any duty that it may have had to bargain with the Union regarding the wages, hours, and other terms and conditions of employment for members of the drivers-yardmen unit. That question, in turn, can be divided into two sub-questions: whether (and, if so, when) Tyson had a duty to bargain with the Union; and whether Tyson violated that duty by unilaterally setting the terms and conditions of employment for Holly Farms employees who joined Tyson's newly-integrated transportation department.

A

On March 24, 1989, following a Board-conducted election, the Union was certified to represent Holly Farms employees in the drivers-yard-men unit. Thereafter, the Union and Holly Farms bargained unsuccessfully for a contract. On July 18, 1989, Tyson acquired a controlling interest in Holly Farms' stock. For the next two months—until Tyson converted some of the drivers and yardmen to its own payroll on September 22—Tyson did not make any significant changes in Holly Farms' business operations.

By September 11, Tyson had decided to integrate the entire Holly Farms transportation department into its own transportation department. The

following day, Holly Farms announced that decision to the Union. Holly Farms also announced to the employees —without bargaining with their duly elected Union representative—that they would be offered jobs as Tyson employees, under Tyson's pay plan and working conditions, which were substantially different from, and at least arguably inferior to, those of Holly Farms. Holly Farms also stated that its transportation department would no longer exist after the integration and that, therefore, the Union no longer represented the employees. Subsequently, Tyson sent the employees letters which offered them jobs as Tyson employees, on Tyson's terms, and which required them to respond by September 22. Forty-

seven of the unit employees refused the offer because of those terms and lost their jobs as of September 22.

The Board found that Tyson came under a duty to bargain with the Union at the time of the stock purchase (on July 18, 1989) and that thereafter Tyson committed numerous violations of § 8 of the Act. We hold that the evidence supports those findings.

B

Section 8(a)(5) of the Act, 29 U.S.C. § 158()(5), in conjunction with § 9(a) of the Act, *id.* § 159(a), makes it an unfair labor practice for an employer to refuse to bargain with the union selected by the majority of its employees in an appropriate unit. A union that is certified by the

Board after winning a Board-conducted election is entitled to a "conclusive presumption" of majority support among the employees for one year after certification. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987). Accordingly, absent unusual circumstances, an employer violates § 8(a)(5) by withdrawing recognition from a union during its certification year. *See id.* at 37-39; *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954).

The Board and Petitioners agree that on March 24, 1989, the Union became certified to represent certain Holly Farms employees. Thus Holly Farms had a duty to recognize and bargain with the Union until March of 1990. Further, the most recent Su-

preme Court case involving these issues explains:

> "[A] mere change of employers *or of ownership* in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of *ownership* or management were employed by the preceding employer."

Fall River, 482 U.S. at 37 (quoting *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 (1972) (emphasis added)). Here, the new owner, Tyson, employed exclusively Holly Farms employees in unchanged Holly Farms units for two months. Thus the force of the Union's certification remained in effect.

When there is "substantial continuity" between a new business enterprise and a previous enterprise, a

new employer may be obligated to recognize and bargain with a certified union which represented the employees while they worked for the predecessor employer. *See Fall River*, 482 U.S. at 43; *Burns*, 406 U.S. at 277-81; *Zady Natey, Inc. v. United Food and Commercial Workers Int'l Union*, 995 F.2d 496, 498 (4th Cir.), *cert. denied*, 114 S. Ct. 470 (1993). Such a new employer has been termed a "successor." *E.g., Fall River*, 482 U.S. at 41; *Burns*, 406 U.S. at 284. If the new employer is not an entirely separate corporate entity, but rather has purchased the stock of the predecessor employer, the new employer may be further obligated to adhere to the terms of any existing collective bargaining agreement ("CBA") between the

predecessor employer and the union. *See, e.g., Burns*, 406 U.S. at 291 ("[I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.") (dicta); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 751 (7th Cir. 1989); *see also Hendricks-Miller Typographic Co.*, 240 N.L.R.B. 1082, 1085 (1979) (holding that a new stockowner inherits the previous owner's obligations to employees, specifically obligations formed by corporation membership in a multiemployer unit). Some have called such an employer a "successor," *Burns*, 406 U.S. at 291 (dicta); others have re-

jected this terminology in light of the fact that an ordinary "successor" is not bound by any existing CBA, *Esmark*, 887 F.2d at 751; *Hendricks-Miller*, 240 N.L.R.B. at 1085. *See also Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180 (1973) (referring to a purchaser of a business as a "successor," but calling the business itself a "continuing business enterprise"). When the predecessor employer continues as a corporate entity, that employer remains bound by its existing duties to the union, and has been called a "continuing employer." *EPE, Inc. v. NLRB*, 845 F.2d 483, 487 (4th Cir. 1988). In such a situation, both the "continuing employer" and the new stockowner have joint simultaneous duties to the

union. *See Miami Foundry Corp. v. NLRB*, 682 F.2d 587, 589 (6th Cir. 1982) (per curiam) (holding a new managing corporation and two stockholders, one owning 59 percent of the corporation and one owning the remainder, to be three joint employers, jointly under a duty to negotiate with the union which had been formed earlier, at a time when the employees were employed by only one of the stockholders).

In the instant case, the Board found that Tyson became a "successor" to Holly Farms as of July 18, 1989, the date that Tyson purchased Holly Farms' stock. In our review, we "must defer to the NLRB's application" of successorship principles "so long as it is rational and not incon-

sistent with the [Act]." *EPE*, 845 F.2d at 489-490 (quoting *United Food and Commercial Workers Int'l Union v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985)). Looking beyond the terminology to the principles at play here,

> "[t]he real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the new employer and of the policies of the labor laws . . . . There is, and can be, no single definition of 'successor' which is applicable in every context."

NLRB v. General Wood Preserving Co., 905 F.2d 803, 819 (4th Cir.) (quoting *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 n. 9 (1974)), *cert. denied*, 498 U.S. 1016 (1990). Whatever terms we use—whether we

call Tyson a "successor," or a "new stockowner," or a "joint employer"—substantial evidence and the policies of the labor laws support the Board's finding here that Tyson came under a duty to bargain with the Union when it purchased Holly Farms. Although Tyson might also be obligated to adhere to the terms of any existing CBA, *see, e.g., Esmark*, 887 F.2d at 751, we need not decide that issue, as no CBA yet existed between the Union and Holly Farms.

Although the Supreme Court has yet to decide the question, the policies behind the labor laws compel the finding that a new stockowner acquires the duty to bargain with an existing union at the time of a stock transfer. The policy underlying the

National Labor Relations Act is to promote industrial peace. *E.g., EPE*, 845 F.2d at 489. The successorship doctrine as expressed in *Burns, supra*, 406 U.S. 272, seeks to promote this policy "by forestalling the employee frustration that could result if employees found themselves in substantially the same job, but deprived of the representation of their union." *EPE*, 845 F.2d at 489, citing *Fall River*, 482 U.S. at 38. From the perspective of the employees, a stock transfer is simply a shell game; as we explained in *EPE, supra*:

> [I]ndustrial peace may suffer if workers find themselves working at the same job for the same corporation, but suddenly deprived of the benefits of a collective bargaining agreement as the result of a stock transaction that, from the workers' point of

> view, appears little more than an artifice.
>
> Every change in corporate ownership cannot raise the specter of disruption in the labor relations of the company being bought or sold.

845 F.2d at 489. The Supreme Court has expounded further, in holding that an arbitration clause of a collective bargaining agreement between a union and an employer binds a "successor employer" who merges the first employing corporation into its own:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. . . .
>
> . . . While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . .

John Wiley & Sons v. Livingston, 376 U.S. 543, 549-50. Moreover, "the usual corporate law rule is that the contracts of a corporation remain in effect despite a sale of the corporation's stock." *Esmark*, 887 F.2d at 751; *see also John Wiley*, 376 U.S. at 550 n. 3.

In light of these labor policy concerns, the evidence amply supports

the Board's finding that as of July 18, 1989, the date that Tyson purchased the Holly Farms' stock, Tyson came under a duty to bargain with the Union previously formed by Holly Farms employees. For two months after the purchase, Tyson made no significant changes in Holly Farms' operations. Holly Farms—under Tyson's ownership—continued to engage in the same business operations at the same locations, selling the same products to the same customers, and it retained all of its employees under the same supervision and the same wages, hours, and working conditions. Those facts establish substantial continuity between Holly Farms and Tyson. In view of that continuity, the employees would "understandably

view their job situations as essentially unaltered," and could reasonably be expected to continue their support for the Union. *Fall River*, 482 U.S. at 43; *accord General Wood Preserving Co.*, 905 F.2d at 819, *Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1364-66 (10th Cir. 1992); *cf. NLRB v. Dent*, 534 F.2d 844, 846 n.2 (9th Cir. 1976) (because the successor had preserved the predecessor's wage rates for just two weeks following a takeover, the successor could not thereafter alter those rates unilaterally).

Additionally, the employees at issue here were frustrated in their attempts to negotiate with their employer by the fact that Tyson did not negotiate with their Union. Holly

Farms suspended serious negotiations with the Union while Tyson was in the process of purchasing Holly Farms' stock. The recently unionized employees remained in identical jobs, yet were left in limbo, no employer having offered to negotiate with their Union. Therefore, the Board reasonably found that Tyson came under a duty to negotiate with the union as an employer ("successor" or otherwise) in July 1989.[1]

[1] Other federal appellate courts have come to similar conclusions in the stock purchase context. *See, e.g., United Food & Commercial Workers Int'l Union*, 768 F.2d at 1474 (D.C. Cir) (reversing, for lack of substantial evidence, National Labor Relations Board decision that a new stockowner was not a "successor" employer, with duties to an existing union); *Miami Foundry Corp.*, 682 F.2d at 589 (6th Cir.) (holding new stockowners and managers under a duty to bargain with pre-existing union).

C

Next we must determine whether Tyson violated its duty to bargain with the Union when it unilaterally set certain terms and conditions of employment for members of the drivers-yardmen unit. We conclude that the Board's finding that Tyson violated § 8 of the Act was supported by substantial evidence.

An employer's duty to bargain with its union encompasses the obligation to bargain over the following mandatory subjects—"wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *see id.* § 158(a)(5). That obligation includes a duty to bargain about the "effects" on employees of a management decision that is not itself sub-

ject to the bargaining obligation. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-82 (1981); *NLRB v. Litton Fin. Printing Div.*, 893 F.2d 1128, 1133-34 (9th Cir. 1990), *rev'd in part on other grounds*, 501 U.S. 190 (1991). Where changes in employee working conditions constitute such a bargainable effect, an employer violates §§ 8(a)(5) and (1) of the Act by implementing those changes without bargaining with the union. *See Litton*, 893 F.2d at 1133-34. The employer also violates §§ 8(a)(5) and (1) if it negotiates directly with its employees, rather than with their union representative, about such changes. *See EPE*, 845 F.2d at 491.

On September 12, 1989, the Company announced that the employees in the drivers-yardmen unit would be offered jobs as Tyson employees under *Tyson's* working conditions. That announcement plainly changed a wide range of matters—including wages, hours, work rules, work schedules, and work locations—that go to the heart of the bargaining obligation under § 8 of the Act. The Company announced those changes in conjunction with its announcement of its integration decision, merging Holly Farms' and Tyson's transportation departments. Thus, the Board concluded, the changes and the offer to employees to work under those changes were "effects" of the integration decision

and were subject to the duty to bargain.

Following the announcements of September 12, the Company sent letters to the employees offering them jobs as Tyson employees under Tyson's working conditions, and it met with groups of employees to discuss those working conditions. The Company did not give the employees the option of remaining employed under their existing working conditions. Forty-seven drivers who refused the offer because it included Tyson's working conditions lost their jobs. Thus, the Company bypassed the Union and negotiated directly with the employees about their working conditions; and, as a result, forty-seven members of

the drivers-yardmen unit lost their jobs.

The Company and the Board have agreed that the decision to integrate the two transportation departments was a management decision that was not itself subject to the bargaining obligation. The Company has argued that the establishment of new working conditions for the Holly Farms employees was an integral part of that management decision. The Board has countered that the working conditions were "effects" of that decision, rather than intrinsic parts of the decision itself, and therefore were subject to the duty to bargain.

The Supreme Court in *First National Maintenance, supra,* enunciated a distinction between "economically-

motivated" management decisions, 452 U.S. at 680, and the "effects" of those decisions. *Id.* at 677 n.15, 682. In *Litton, supra*, the Ninth Circuit expounded upon that distinction. On the one hand, there is the management decision itself, including any subject that is "'inexorably'" intertwined with, or the "inevitable consequence" of, that decision. 893 F.2d at 1133 n.3, 1134 (quoting *First Nat'l Maintenance*, 452 U.S. at 677). For example, when a company decides to shut down a plant entirely, the resulting layoff of the plant's workers may be an "inevitable consequence" of the decision itself. On the other hand, there may be mere "effects," which are "*not the inevitable consequence* of the underly-

ing management decision." *Id.* at 1134 (emphasis added). Where a company had feasible alternatives that it could have explored with the union, without reconsidering its underlying management decision, those alternatives are mandatory subjects of bargaining. The mere fact that the alternatives may increase labor costs does not make them "infeasible." *See id.* (citing *First Nat'l Maintenance*, 452 U.S. at 680).

Here, it was not inevitable for the Company to impose Tyson's pay plan and working conditions upon Holly Farms' drivers. Generally, Tyson's pay plan provided the truck drivers with lower pay per mile but somewhat higher pay per delivery, or "drop," than Holly Farms' pay plan.

We are not convinced that the substitution of Tyson's pay structure for Holly Farms' was an "inevitable consequence" of the management decision to integrate the two transportation departments. Furthermore, as Tyson concedes, it tried to accommodate the drivers' individual preferences as to the duration and mileage of their hauls, which tended to be much longer under Tyson's system than under Holly Farms'—a major point of contention between the Company and the drivers. From those facts alone, it was reasonable for the Board to infer that there was room for bargaining over the drivers' working conditions, had Tyson been willing to bargain. Therefore, the Board reasonably concluded that the changes unilaterally

established by Tyson concerned mandatory subjects of bargaining—"effects" of the nonbargainable decision to integrate Tyson's and Holly Farms' transportation departments. Accordingly, we enforce the Board's order to the extent that it found Tyson's refusal to bargain with the Union to be a violation of the Act.

IV

The other significant question presented for review is whether any of the employees in the live-haul bargaining unit fell outside the coverage of the Act. The Company has argued that the unit was inappropriate because it contained "agricultural laborers," who are not subject to the Act. Therefore, the Company has contended, the Board committed an er-

ror of law when it approved the bargaining unit.[2]

On review, our function is a "limited" one. *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 304 n.14 (1977) (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944)). The Board's determination that the employees in the live-haul bargaining unit were covered by the Act "'is to be accepted if it has "warrant in the record" and a reasonable basis in law.'" *Bayside*, 429 U.S. at 304 n.14 (quoting *Hearst Publications*, 322 U.S. at 131). Regardless of how we, as a federal court,

[2] The Company also has contended that the Board compounded that error when it issued a bargaining order in the live-haul unit pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and when it recognized unfair labor practices aimed at employees in that unit.

might have resolved the question as an initial matter, we must give appropriate weight to the judgment of the Board, whose special duty is to apply the Act's broad statutory language to an almost unlimited variety of fact patterns. *See Bayside*, 429 U.S. at 304; *cf. NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968); *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264, 269 (1956); *Universal Camera Corp.*, 340 U.S. at 488; *NLRB v. Pilot Freight Carriers, Inc.*, 558 F.2d 205, 207-08 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

A

The live-haul unit, as approved by the Board, consisted of two groups of North Carolina employees: the Wilkesboro facility's live-haul

crews; and the Roaring River facility's feed mill employees, feed-haul drivers, and mechanics. The Company has conceded that the Roaring River workers were statutory "employees" protected by the Act. The Company's sole claim of error is that the live-haul workers at the Wilkesboro facility—*i.e.*, the live-haul truck drivers, forklift operators, and "chicken catchers"—were agricultural laborers, who fall outside the Act's coverage and therefore should not have been included in the bargaining unit.

The Wilkesboro plant is a vertically integrated poultry operation. In its hatchery operations, Holly Farms hatches pullets, or laying hens. At twenty weeks of age, the

pullets are transferred to "laying houses" operated by independent "contract growers." The eggs produced by the pullets are transported back to the Holly Farms hatchery operations, where they are hatched. The Company transports the resulting chicks to independent contract growers who are paid to raise the chicks into full-grown broiler chickens. When the birds are seven weeks old, the live-haul crews catch, cage, and transport them to a storage and cooling area near the processing plant, where they will be slaughtered and prepared for market.

The employees in the live-haul unit serve as the Wilkesboro facility's chicken-catching crews. A crew consists of a live-haul truck driver,

a forklift operator, and about nine "chicken catchers."[3] The live-haul driver drives a flat-bed truck, which carries the entire crew to the farms of the independent contract growers who raise the broiler chickens. Under cover of darkness, the chicken catchers manually catch and cage the chickens, the forklift operator places the steel cages on the flat-bed truck, and the truck delivers the chickens to a storage area near the Company's processing plant.

B

The protections of the Act extend only to statutory "employees." Section 9(a) of the Act provides that "[r]epresentatives designated or se-

[3] The entire bargaining unit consists of 27 live-haul drivers, 12 forklift operators, and 118 chicken catchers.

lected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a). A unit cannot be deemed appropriate unless it is comprised of individuals who are "employees" within the meaning of the Act.

Section 2(3) of the Act defines the term "employee" to exclude "any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). Section 2(3)'s exemption for "agricultural laborer[s]" must be narrowly construed, to favor the workers for whose protection the Act was designed. *See NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339 (5th Cir.

1993) (citing *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir.), *cert. denied*, 389 U.S. 834 (1967)).

The term "agricultural laborer" has the meaning specified in § 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f). *Bayside*, 429 U.S. at 300 & n.6. That provision states that "agriculture" encompasses "farming in all its branches," including "the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29

U.S.C. § 203(f); *see Bayside*, 429 U.S. at 300.

Under that provision, agriculture is defined "in both a primary and a secondary sense." *Bayside*, 429 U.S. at 300. The primary meaning encompasses "farming in all its branches," including the raising of poultry. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949); *accord Bayside*, 429 U.S. at 300 n.7. The secondary meaning encompasses a wider range of practices, so long as they are linked in specific ways to primary agriculture. *See Bayside*, 429 U.S. at 300 n.7, 301; *Farmers Reservoir*, 337 U.S. at 762-63. Thus, the secondary meaning "includes any practices, whether or not themselves farming practices, which are per-

formed either by a farmer or on a farm, incidentally [sic] to or in conjunction with" primary farming operations. *Farmers Reservoir*, 337 U.S. at 763; *accord Bayside*, 429 U.S. at 300 n.7.

Under the express language of the FLSA, an employer that raises poultry on its own farm is engaged in primary agriculture. *See* 29 U.S.C. § 203(f). However, "'when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks.'" *Bayside*, 429 U.S. at 302 n.9 (quoting *Imco Poultry*, 202 N.L.R.B. 259, 260 (1973)).

C

The Company has conceded that the employees in the live-haul unit are *not* engaged in primary agriculture. Rather, the Company has claimed that the employees' work amounts to secondary agriculture. The Board rejected that claim.

In reviewing the Board's decision, we must distinguish between chicken catchers and forklift operators, on the one hand, and live-haul drivers, on the other hand. The Company's strongest argument concerns the former employees, who, the Board concedes, work "on a farm," within the meaning of the statute. 29 U.S.C. § 203(f). Therefore, with regard to the chicken catchers and forklift operators, we must determine whether

the activities of catching, caging, and loading live chickens onto a truck for delivery are clearly performed as an incident to or in conjunction with the primary farming operation of raising poultry.

The Company has argued that the chicken catchers and forklift operators' work is closely linked to the independent contract growers' primary agricultural activity of raising poultry. By the Company's account, because the chicken catchers and forklift operators perform "on a farm," and because they perform work that is incidental to the independent grower's farming activities on that farm, they must be deemed "agricultural laborers."

The NLRB has countered that the chicken catchers and forklift operators are not engaged in secondary agriculture because, by the time they perform their work on the broiler chickens, their employer—Holly Farms—is no longer engaged in primary agriculture with respect to those chickens. Long before the chicken catchers catch and cage the birds, the Company has turned the broiler chicks over to independent contract growers and the Company's status as a farmer engaged in raising poultry (a primary agricultural activity) has ended with respect to those chicks. *See Bayside*, 429 U.S. at 302 n.9; *Imco Poultry*, 202 N.L.R.B. at 260. Thus, the Board has reasoned, the employees' activities are neither

incidental to nor in conjunction with *Holly Farms'* primary agricultural practices and, therefore, the employees' work cannot amount to secondary agriculture.

The case at bar is not one of first impression. The Board's position here is perfectly consistent with those it has taken in similar cases. *See, e.g., Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992) (rejecting a poultry company's contention that its "chicken catchers" were engaged in primary or secondary agricultural activity, and stating that, "[w]hen employers have claimed that employees are agricultural laborers because they are engaged in activity incidental to or in connection with farming operations (the

secondary definition of agriculture), the courts have generally rejected the claimed agricultural status when the employees in question were handling or working on agricultural products raised on farms other than their own employer's"); *see also Seaboard Farms of Kentucky, Inc.*, 311 N.L.R.B. No. 159 (1993) (requiring a poultry company to bargain with a unit that included the company's "chicken catchers, . . ., live haul drivers, [and] forklift operators").

Furthermore, other federal appellate decisions, squarely on point, have held that employees in chicken-catching crews were statutory "employees," not "agricultural laborers." *See NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105, 1106 (8th Cir.

1982) (per curiam), *cert. denied*, 459 U.S. 1069 (1982) (holding that "truck drivers and yard workers [who] transport [an integrated poultry producer's] poultry between independent contract growers, which raise the chickens to market weight, and the company's processing plant" were "employees," rather than "agricultural laborers," under the Act); *Valmac Indus. v. NLRB*, 599 F.2d 246, 247, 249 (8th Cir. 1979) (holding that, because a company's "live chicken haulers and chicken catchers" "transported product *away* from the farm, their work was neither 'primary' nor 'secondary' farming," and that they therefore were "employees" within the

meaning of the Act (emphasis added)).[4] We affirm the Board's conclusion that none of the employees in the live-haul bargaining unit were agricultural laborers, because that conclusion is based on a reasonable interpretation of the Act and is consistent both with the Board's prior decisions and with federal appellate case law.

V

We have considered the remaining arguments in the Company's petition for review and find them meritless. Accordingly, the Company's petition

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[4] We decline to follow the case cited by the dissent, *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. Unit A 1980). The Fifth Circuit's decision that "loader operators and live haul drivers" for a poultry company were "employees employed in agriculture," and thereby exempt from *FLSA*'s overtime provisions, *id.* at 1078, fails to give proper weight to the judgment of the Board, *see Bayside*, 429 U.S. at 304.

for review is denied, and the order of the Board is

ENFORCED.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

The National Labor Relations Board (the Board) found that Holly Farms Corporation violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA) in connection with a representation election in the spring and summer of 1989. It also found that after Tyson Foods, Incorporated, acquired all the stock of Holly Farms, both Tyson Foods and Holly Farms violated sections 8(a)(1), 8(a)(3), and 8(a)(5) in connection with Tyson's disbanding Holly Farms' transportation operations and integrating Holly Farms' truck drivers into Tyson's existing transportation operations. Generally, I agree with the majority's opinion that the findings of fact by the Administrative Law Judge (ALJ), as affirmed by the Board, are supported by substantial evidence and, therefore, I agree that these factual findings should be affirmed under the appropriate standard of review. *See* 29 U.S.C. § 160(e).

While I do not take issue with the purely factual findings, I nevertheless believe that the Board erred in two significant respects in applying the law. First, I believe that the Board erred as a matter of law when it concluded that chicken catchers, fork lift operators, and live-haul drivers were properly included in the

bargaining unit. Instead, I would find that these individuals were agricultural employees excluded from coverage by the NLRA. Second, on an issue that has far greater ramifications for our labor law jurisprudence than this first narrow dispute over definitions, the majority opinion significantly misconstrues the law of successorship liability when it refuses to recognize the existence of two separate corporate entities for the two months after the stock purchase by Tyson. I submit that Tyson was not liable as a successor employer when it purchased 100% of the stock of Holly Farms Corporation on July 18, 1989, because Holly Farms Corporation continued as a separate entity and remained as a continuing

employer for two months, with no change in its relationship with its employees. Tyson did succeed Holly Farms in September 1989 when it merged Holly Farms' operation into its own, and thus became a substitute employer of Holly Farms' former employees. However, even then, Tyson did not incur successor liability under the NLRA, because the restructuring, undertaken for independent and valid economic reasons, was so substantial that an appropriate bargaining unit did not survive. On these two matters, I would grant the employer's petition for review and deny enforcement of the order to the extent it depends on these erroneous conclusions by the Board. In all

other respects, I concur in the majority opinion.

I

Holly Farms Corporation was an integrated poultry business, engaged in raising, processing, and distributing poultry products. As part of its operations, it hatched chickens and placed them with contract farmers to raise them until the chickens were "harvested" by Holly Farms employees. Holly Farms employed 118 chicken catchers, 12 fork lift operators, and 27 live-haul drivers who, as a group, were responsible for driving to the farms, catching chickens, loading them, and transporting them back to the plants for processing. As found by the ALJ, the chicken catchers went

> to the farms where the chickens were raised where,

> under cover of darkness, [they] would continuously catch chickens with their hands and cage them during shifts of indeterminate duration, which continued until the task was completed.

The fork lift operators worked on the farms with the chicken-catchers and were responsible for placing steel cages loaded with chickens onto live-haul trucks. The live-haul drivers drove the crew from the plant to the farms and, after the chickens were caught and the cages were loaded, transported the chickens back to the plant for processing. Occasionally, live-haul drivers assisted the chicken catchers in the "harvesting." All of these employees, I submit, were agricultural employees, as defined by the NLRA, and therefore

were excluded from the Act's coverage.

The NLRA excludes from its definition of "employee" any individual employed as an "agricultural laborer." 29 U.S.C. § 152(3). Thus, agricultural laborers are not protected by section 8(a)(1), 8(a)(3), or 8(a)(5) of the NLRA. The definition of an agricultural laborer is to be derived from § 3(f) of the Fair Labor Standards Act. *See Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 300 n.6 (1977). The Fair Labor Standards Act defines "agriculture," in pertinent part, to include:

> farming in all its branches and among other things . . . the raising of livestock . . . or poultry, and any practices . . . performed . . . on a farm as an incident to or in conjunction with such farming

> operations, including preparation for market, delivery to storage, or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

In this case, the work of chicken catchers and fork lift operators was performed "on a farm as incident to or in conjunction with such farming operations" and therefore clearly qualifies these individuals as "agricultural laborers." Moreover, all these chicken catchers, fork lift operators, and live-haul drivers were involved in "preparation for market" and "delivery to storage or to market." Because they were engaged as agricultural laborers, these employees are not covered by the National Labor Relations Act. *See Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077,

1081 (5th Cir. 1980). *But see*, at least as to live-haul drivers, *NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105 (8th Cir.), *cert. denied*, 459 U.S. 1069 (1982).

II

With respect to the second error of law committed by the Board, the facts were stipulated by the parties. Tyson acquired 100% of the stock of Holly Farms on July 18, 1989, but Holly Farms nevertheless continued in business for two months without change, under the same management and with the same employees. The two corporations remained separate corporations, and the only change Holly Farms experienced was in stock ownership. These facts were recognized by the Board. It stated, "[F]or 2

months following the purchase *nothing changed for the former Holly Farms employees*, all of whom were retained on the payroll under their existing wages, hours, and terms and conditions of employment." (Emphasis added.) Thus, from the employees' point of view, they still worked for Holly Farms under the same conditions that existed before the stock purchase.

Necessarily following from these acknowledged facts is the fact that Holly Farms alone retained the obligation to bargain with the union, and it did so. Correspondingly, Tyson, as the sole stockholder of Holly Farms, which at the time had implemented no changes in Holly Farms' operations, had no obligation to bar-

gain. It was a separate corporation and therefore *had not succeeded* to any obligation of Holly Farms to bargain simply by buying Holly Farms' stock. As was stated by the Seventh Circuit in *Esmark, Inc. v. NLRB*, 887 F.2d 739 (1989):

> The successorship doctrine is simply inapplicable to a stock sale transaction. In the successor context, the question is whether two different corporate entities, one succeeding to the other's business, are bound in like measure by a contract executed by only one of them; however "the stock transfer involves no break or hiatus between two legal entities, but is, rather, the continuing existence of a legal entity, albeit under new ownership." The successorship doctrine is therefore of no relevance to the present case, which involves a transfer of stock ownership in the employing corporation from one party to another.

Id. at 751 (footnote omitted). This statement from *Esmark* is simply a restatement of the successorship doctrine established by the Supreme Court in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). In *Burns*, the Court concluded that a corporation that *succeeded* another corporation as the employer of a specific work force may have the obligation to bargain with the union certified when the employees were employed by the previous corporation. The obligation arises for the successor corporation "when it select[s] as its work force the employees of the *previous* employer to perform the same tasks at the same place they had worked in the past." *Id.* at 278 (emphasis added). There

must be a change of employer so that one supplants the other. Obviously, if the previous corporation continues in its existing form as the employer, no succession occurs. Consequently, when Tyson became stockholder, but not employer, and Holly Farms continued as employer, Tyson would have no obligation to bargain because it had not yet succeeded Holly Farms. The Board has in the past subscribed to these statements of the law. For example, in *Hendricks-Miller Typographic Co.*, 240 N.L.R.B. 1082, 1083 n.4 (1979), the Board stated:

> The concept of "successorship" as considered by the United States Supreme Court in *N.L.R.B. v. Burns International Security Services, Inc., et al.*, 406 U.S. 272 (1972), and its progeny, contemplates the substitution of one employer for another, *where the*

> *predecessor employer either terminates its existence or otherwise ceases to have any relationship* to the ongoing operations of the successor employer.

(Emphasis added).[5]

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[5] The majority opinion has glossed over factual and legal distinctions between (1) the situation where a corporation continues in business, after its stock changes hands, without any change in its relationship with employees, and (2) the situation where a corporation moves through corporate and factual changes so that in effect a new employer *substitutes* for that of the former and exercises the "employer's authority" of the former. In the first situation, the *employing* corporation continues to have an obligation to bargain with its employees, notwithstanding the change in stock ownership which is irrelevant, and the stockholder does not become a substitute employer. In the second situation, successor liability imposes a duty to bargain on the successor employer. The majority collapses this distinction into an inquiry into a nebulous subscription to labor policy, stating:

> Whatever terms we use—whether we call Tyson a "successor," or a "new stockowner," or a "joint employer"—substantial evidence and the policies of the labor laws support the Board's finding here that Tyson came under a duty to bargain with the Union when it purchased Holly Farms.

Slip op. at 8. Such an approach is clearly foreclosed by *Burns*, *Esmark*, and *Hendricks-Miller*.

Under the stipulated facts here, the truck drivers in Holly Farms' transportation operations remained employed with Holly Farms for two months after Tyson's stock purchase. Their responsibilities and conditions of employment remained unchanged for those two months. When two separate corporate entities continue in separate form, as they did here, we must conclude that there was no succession for purposes of the successorship doctrine. *See Esmark*, 887 F.2d at 751.

In *EPE, Inc. v. NLRB*, 845 F.2d 483 (4th Cir. 1988), we examined a case strikingly similar to this in which one company, Echlin, purchased 100% of the stock of EPE, Inc. Other than the change of ownership from the

stock sale, however, there were no changes in the organization or operations of EPE's Fredericksburg plant. In that case, we declined to find successorship and held that EPE was a "continuing employer" still liable under its collective bargaining agreement. We emphasized that:

> There was no termination of operations or employees at the Fredericksburg plant. . . . Simply put, the Fredericksburg workers both went to work on the morning of Tuesday, October 22, and returned home later that afternoon as EPE employees. During that same time there occurred *not a substitution of one employer for another, but a change in the ownership of a continuing employer.*
>
> * * *
>
> EPE was a continuing employer. Operations at the plant were essentially unaffected by the stock transfer.

Id. at 488. We held that EPE was a "continuing employer" after the stock sale and that there was no successor employer of the Fredericksburg workers after the sale.

The situation at Holly Farms for the two months after the July 18 stock sale was no different from that at EPE after it sold its stock. There was no succession of Tyson as a new employer; rather, there was only "a change in the ownership of a continuing employer." *Id.* While I acknowledge that our holding in *EPE* "is a narrow one," I fail to see any fact that distinguishes the employment relationships at Holly Farms for the two months after July 18 from the situation we examined in *EPE*.

The majority opinion concludes, erroneously I believe, that when Tyson purchased the stock of Holly Farms on July 18, it became a successor to Holly Farms because *Holly Farms continued as a corporate entity* without any significant changes in its operations. Indeed, the majority acknowledges:

> For two months after the purchase, Tyson made no significant changes in Holly Farms' operations. Holly Farms—under Tyson's ownership—continued to engage in the same business operations at the same locations, selling the same products to the same customers, and it retained all of its employees under the same supervision and the same wages, hours, and working conditions.
>
> Those facts establish substantial continuity between Holly Farms and Tyson.

Slip op. at 9-10. The problem with the majority's opinion is that it failed to recognize that the termination of the previous employment relationship must be established and that a determination of this requirement should "precede[] the inquiry into the 'substantial continuity' that must be shown for a new employer to be found a successor." *EPE*, 845 F.2d at 489. I agree with the factual observations made by the majority opinion, but its conclusion that these facts give rise to successor liability is simply a misinterpretation of the law. For the two months during which Holly Farms' operations continued unchanged, but with a different stockholder, both Tyson Foods, Inc. and Holly Farms Corporation remained

separate corporations, and Tyson's ownership was simply a stock ownership position. By continuing in existence, Holly Farms retained its obligations to negotiate and bargain with exclusive representatives of the unit duly elected. Holly Farms also retained its obligations to adhere to the specific terms of the collective bargaining agreement already in place with its employees. In sum, the employees' relationship with Holly Farms remained the same, and in those circumstances it is well-established that the successor liability doctrine does not apply. *See Esmark*, 887 F.2d at 751; *Hendricks-Miller*, 240 N.L.R.B. at 1083 n.4.

Without any obligation to bargain during the two months following its

acquisition of Holly Farms' stock, Tyson could not have violated the labor laws for refusing to bargain. The Board's order imposing such a duty thus constitutes error.

In mid-September 1989, Tyson determined, for sound business reasons, to end Holly Farms' transportation operations. While the Board acknowledged that the decision was a legitimate business decision, I note further that Tyson's decision was economically compelling. Before Tyson's acquisition of Holly Farms' stock, Holly Farms transported its poultry products to its customers through its own transportation operation. It often dispatched drivers and trucks to customers with no load available for the return trip because the cus-

tomer network was not so vast as to supply that need. While Holly Farms made an express effort to lower its transportation costs by securing additional back-haul business, its efforts were largely unsuccessful. Indeed, the evidence shows that 50% of Holly Farms return miles were "dead head," where the trucks returned empty, resulting in an estimated annual loss to Holly Farms of approximately $5 to $6 million.

In contrast, Tyson's transportation operations were organized substantially differently, and they were profitable. Tyson hauled only 35% of its products through its own transportation system, making only those deliveries where back-haul business would routinely be available. Be-

cause it delivered only 35% of its products through its own operations, the remaining transportation needs were filled through common carriers. Thus, in contrast to Holly Farms' 50% ratio, Tyson's dead-head ratio was in the range of 7-1/2% to 12%.

In order to eliminate the large losses resulting from Holly Farms' transportation operations, Tyson decided to disband Holly Farms' operations and restructure its own to serve the combined customer base in the manner that Tyson had profitably established for its own customers. Tyson implemented this decision on September 22, 1989, at which time Holly Farms' drivers were terminated, but with an offer to work in Tyson's

operation, subject to Tyson's more efficient methods.

When Tyson disbanded Holly Farms' transportation operations and merged those drivers into its own fleet, Tyson became a substitute employer. At that time, the successorship principles of *Burns* might have required Tyson to bargain with the union if Tyson had continued with the same employees under a similar structure. But Tyson would only have a duty to recognize a preexisting bargaining unit if Tyson's structure and practices mirrored those of Holly Farms. *See Burns*, 406 U.S. at 280. In such circumstances, Tyson would be required to bargain with the union, but Tyson would not be required to accept the terms and agreements of Holly

Farms' collective bargaining agreement with the union because "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Burns*, 406 U.S. at 294.

In this case, when Tyson terminated the Holly Farms transportation operation and hired its truck drivers, the new operational structure and practices differed substantially from those of Holly Farms. Thus, the inherited bargaining unit was no longer an appropriate one. Moreover, the drivers assimilated from Holly Farms only constituted a portion of Tyson's long-haul trucker group. In those circumstances, the Holly Farms bargaining unit did not remain intact and would not be the appropriate unit

with which Tyson was required to bargain.

Deriving unfair labor practices from these circumstances would imply that Tyson, as an acquiring and thereafter successor corporation, must carry the burden of an inefficient structure and inappropriate bargaining unit previously established by Holly Farms. The jurisprudence of *Burns*, and the circuit court decisions interpreting it, do not require this result. *See, e.g., NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 139-40 (3d Cir. 1976). Therefore, I would deny enforcement of the Board's order as it relates to Tyson's conduct in acquiring and restructuring Holly Farms.

For these reasons, I dissent.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD - DIVISION OF JUDGES

HOLLY FARMS CORPORATION
AND ITS SUCCESSOR,
TYSON FOODS, INC.

and Cases 11-CA-13184
11-CA-13267
11-CA-13487

CHAUFFEURS, TEAMSTERS
AND HELPERS LOCAL UNIONS
NOS. 29, 71, 355, 391, 592,
567 and 988, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO

HOLLY FARMS CORPORATION AND
ITS SUCCESSOR, TYSON FOODS,
INC.

Employers

and Case 11-RC-5583

CHAUFFEURS, TEAMSTERS AND
HELPERS LOCAL UNION NO. 391,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO
HELPERS OF AMERICA, AFL-CIO

Petitioner

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J. David James and Bryan Lessley, Esq. (Smith, Patterson, Follin, Curtis, James Harkavy & Lawrence), of Greensboro, NC, for the Charging Parties.
3487

By Chairman Stephens and Members Devaney and Oviatt

On March 12, 1992, Administrative Law Judge Robert M. Schwartzbart issued the attached decision. The Respondents filed exceptions and a supporting brief.[6]

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[6] The Respondents filed a motion to reopen the record to admit evidence material to the question of alleged majority status in the live haul unit and to the effect of delay on the judge's recommended bargaining order in that unit. The General Counsel filed a motion in opposition to the Respondents' motion, and the Respondents filed a memorandum in opposition to the General Counsel's position. After reviewing the parties' submis-
(continued...)

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[7] and has decided to affirm the judge's rulings, findings,[8] and conclusions except as

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[6](...continued)
sions, we deny the Respondents' motion for reasons that will be explained more fully below.

[7] We have accepted the parties' post-hearing stipulation for submission of the Holly Farms Retirement Plan as a joint exhibit. However, we have not considered the evidence submitted with the Respondents' exceptions and brief, which is outside the record.

[8] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct certain errors made by the judge. Regarding the judge's Statement of the Case, we note initially that Local 29 has

(continued...)

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[8](...continued)
geographic jurisdiction over the unit facilities in Harrisonburg, not Harrisburg, Virginia. Local 71 has geographic jurisdiction over the unit facilities in Monroe, North Carolina, not Virginia. Additionally, the correct unit description for the drivers and yardmen unit as set forth in the certification of representative is as follows:

> All driver employees and yardmen at the Employer's Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas facilities; excluding all office clerical employees, and guards and supervisors as defined in the Act.

In sec. III.B,2, par. 1, the judge stated that Sloop was promoted on June 25, rather than September 25, 1989. In sec. III.C.1(d), par. 2, the judge attributed the "scapegoat" statement to Absher, rather than to Branscome. In sec. III.C.2(c), par. 9, we do not rely on the judge's statement that employees were arrested for handbilling during the same week that Lankford gave his speech. In sec. III.C.2(f), par. 3, regarding the judge's reference to the coercive interrogation of employee Church we note that the judge had previously found that the interrogation of Church was not unlawful because Church was an open and active union supporter. In sec. III.C.3(b)(i), par. 5, we note that the effective date for the pay raise for hourly employees that was announced on June 16, 1989, was July 2, 1989. In sec. III.D.2(b), the last word in par. 12 should be west, not east.

We also correct the following case citations: *Rossmore House*, 269 NLRB 1176 (1984); *SMCO, Inc.*, 285 NLRB 1291 (1987); *J. P. Stevens & Co.*, 247 NLRB 420 (1980); and *Quality Aluminum Products*, 278 NLRB 338

(continued...)

[8](...continued)
(1986).

Regarding the judge's findings of violations of Sec. 8(a)(1) affecting the drivers and yardmen unit, in adopting the judge's finding that Dispatcher Absher's statement to employee Branscome regarding the increased use of outside carriers was coercive, we do not rely on his characterization of the relevance of the fact that Absher and Branscome were friends. Cf. *Pittsburgh & New England Trucking*, 238 NLRB 1706, 1707 (1978), enfd. in part mem. 612 F.2d 1309 (4th Cir. 1979) (solicitations made by a friend who was part of management had greater impact in view of the authenticity and credibility of the source).

Additionally, we find it unnecessary to pass on the judge's finding that Supervisory Murphy's statement to employee Layman that he hoped he did not find out who had sent a union card and that he probably knew constituted an unlawful threat of reprisal, because any such finding would be cumulative and would not affect the Order. For the same reason, we find it unnecessary to pass on the judge's finding that the speech given by Holly Farms President Blake Lovette on February 18, 1989, unlawfully threatened employees with job loss. We further note that no exceptions were filed to the judge's finding that Lovette's January 1989 speech was not unlawful.

With respect to the live haul unit, contrary to Member Oviatt's position in his partial dissent, Chairman Stephens and Member Devaney rely on the Board's prior determination in the representation case that the live haul workers are statutory employees.

Regarding the judge's findings of violation of Sec. 8(a)(1) affecting the live haul unit, we find it unnecessary to pass on the judge's finding that the statement made by Live Haul Manager Ray Lovette to employee

(continued...)

modified below, and to adopt the recommended Order as modified and set forth in full.[9]

1. The judge found that the Respondents violated Section 8(a)(1) by discriminatorily excluding prounion literature from the live haul bulletin boards prior to the election in the live haul unit. The judge credited the testimony of Dimmette, a live haul driver, who testified that employees were allowed to post no-

[8](...continued)
Sturgill regarding Sturgill's union cap was coercive, because any such finding would be cumulative. Similarly, we find it unnecessary to pass on the judge's finding that the speech given on March 29, 1989 by Holly Farms Vice President of Human Resources Lankford constituted an unlawful threat of job loss. We note that no exceptions were filed to the judge's finding that Lankford's April 12, 1989 speech was not unlawful.

[9] We have modified the judge's Conclusions of Law, recommended remedy, recommended Order, and notice to conform to the violations found.

tices on the boards. Dimmette testified that on several occasions he posted union notices which, unlike other announcements, never remained on the boards for more than a day. Although Dimmette admitted that he never saw anyone take down the notices, the judge found that "the burden passed to the Respondents, who controlled the bulletin boards to enter a denial or an explanation, which they did not do." The Respondents contend that the judge erred in finding a violation because there is no evidence that employer representatives were responsible for the removal of the literature. We find merit in the Respondents' contention.

An employer violated the Act by discriminatorily prohibiting the

posting of union notices on bulletin boards that are available for general use by employees. *Central Vermont Hospital*, 288 NLRB 514 fn. 2 (1988). Here, the employees had direct access to the bulletin boards and posted notices themselves. Contrary to the judge's finding, the record does not establish that the Respondents controlled the bulletin boards. There is no evidence that the Respondents knew about the union notices, removed them, or authorized their removal.[10] Under the circumstances, we reverse the judge and find that the Respon-

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[10] In this respect, the case before us is distinguishable from *Marathon Letourneau Co.*, 256 NLRB 350, 357-358 (1981) enfd. 699 F.2d 248 (5th Cir. 1983), cited by the judge, in which there was direct evidence that the union literature was discriminatorily removed by a statutory supervisor.

dents did not unlawfully remove union literature from the bulletin boards.

2. The judge found, and we agree, that the Respondents violated the Act by granting the live haul unit employees a wage increase on July 2, 1989,[1] shortly before the scheduled election on July 27. Although we agree with the judge's conclusion and with his analysis of the relevant facts, we do not rely on any presumption that increases granted during a union organizing campaign are unlawful. Rather, we draw an inference of improper motivation and interference with employee free choice from all the evidence presented and from the Respondents' failure to establish a

[1] All dates are in 1989 unless otherwise indicated.

legitimate reason for the timing of the increase. See *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp.*, 298 NLRB 439 fn. 2 (1990).

In terms of timing, the Respondents maintain that the wage increase was not unlawful because both the decision to grant the increase and its announcement on June 16 were made after the Board had dismissed the representation petition in the live haul unit and before the Board on June 20 reordered an election. However, regardless of when the Respondents knew that an election would be held, the salient fact is that the wage increase was both announced and made effective *after* the representation petition was reinstated on April 28. Thus, the wage increase

was plainly granted during the union organizing campaign.

The Respondents also contend that the increase was given for legitimate business reasons, as explained in its June 16 letter to employees.[12] We find, however, that even if business at Holly Farms had improved during the spring of 1989, the Respondents have not established a legitimate reason for the timing of the increase. As found by the judge, not only was the wage increase unscheduled, but it was contrary to Respon-

[12] The letter stated in pertinent part:

> This wage increase would not have been implemented until January 1, 1990. However, our markets have been substantially better than planned. Even more importantly, together we have improved efficiency company-wide, thus enabling Holly Farms to implement the wage increase six months ahead of time.

dent Holly Farms' stated policy, set forth in its December 16, 1988 letter to employees, that wage rates would not be raised for 1989. In addition to being against stated policy, the wage increase addressed a primary concern of the live haul employees, who informed Live Haul Manager Ray Lovette in April that the pay from their short 4-day workweek was inadequate. Finally, as emphasized by the judge, the size, timing, and applicability of the increase proceeded entirely at the Respondents' discretion.

The Respondents also contend that the fact that the increase was given to all 11,000 Holly Farms employees who were not represented by bargaining units indicates the lack of an

intent to coerce or discriminate against the 201 members of the live haul unit. Although we recognize that the unit employees comprised only a small percentage of the total number of employees receiving the increase, this factor does not persuade us, under the totality of the circumstances here, that the wage increase was not unlawful. In addition to the factors discussed above, we note that at the time the wage increase was given, Holly Farms' production employees were in the midst of union organizing activities.[13] Thus, the wage increase might have been reasonably calculated to discourage union

[13] There were about 2000 production workers at Wilkesboro. As of the time of the hearing, no labor organization had filed a petition seeking to represent the production employees.

activity throughout Holly Farms. See *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 852 (D.C. Cir. 1984), enfg. 263 NLRB 834 (1982). In this regard, the judge found numerous instances of unlawful conduct designed to undermine the Unions' organizing efforts. See *Q-1 Motor Express*, 308 NLRB No. 185, JD slip op. at 16 (Sept. 30, 1992).

Finally, we reject the Respondents' contention that the speech given to the unit employees by Vice President of Human Resources Lankford shortly after the Board ordered the election negated any coercive effect of the wage increase under the standards set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In his speech, Lankford did not admit

to any wrongdoing, as required under *Passavant*. Rather, he sought to justify the increase on economic grounds and to put to rest "the rumor" that the increase was given because of the election. Additionally, the speech did not occur in an atmosphere free of other unfair labor practices. See *Farm Fresh, Inc.*, 305 NLRB No. 132 fn. 1 (Dec. 19, 1991). For all these reasons, we agree with the judge that the wage increase given to live haul employees was unlawful.

3. The bargaining issues presented concern the relationship between Respondents Holly Farms and Tyson, and their respective bargaining obligations with respect to changes that were made in the transportation division of Holly Farms after its pur-

chase by Tyson. The facts are set forth in full in the judge's decision. In brief, the relevant facts are as follows:

The Unions and Respondent Holly Farms engaged in good-faith bargaining with respect to employees in the drivers and yardmen unit beginning on March 24. The Respondents' attorney, Hogg, was chief spokesperson for the Company, and Blevins, who was secretary-treasurer of Teamsters Local 391, filled that role for the Unions.

The parties stipulated that on July 18, Tyson Foods purchased a controlling interest in the stock of Holly Farms Corporation. They further stipulated that Holly Farms since that date has been engaged in the same business operations at the

same locations selling the same products to substantially the same customers, and that a majority of the employees were previously employees of Holly Farms. Holly Farms is described in the stipulation as being wholly owned by Tyson Foods.

The judge found that the parties agreed to suspend negotiations during July in order to gain time to clarify Holly Farms' status and bargaining position following the purchase. Negotiations resumed on August 8. At the outset of the meeting, Hogg informed the Unions' negotiators that Tyson representatives were present for informational purposes and were prepared to answer questions about the changes that Tyson planned to implement. More specifically, Hogg

stated that Tyson wanted to integrate the western divisions of Holly Farms transportation department[14] with the Tyson transportation system, which would entail some layoffs of drivers. According to Hogg, the eastern division of Holly Farms transportation department[15] would continue to operate under the Holly Farms name, but with a reduced number of drivers and tractors. Union Representative Blevins objected to any reduction in the number of drivers in the east. The parties continued to negotiate contract terms.

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[14] The western division consisted of the facilities in Texas.

[15] The eastern division consisted of the facilities in Virginia and North Carolina.

The parties met on several other occasions in August.[16] At the September 12 negotiating session, Hogg announced that the Respondents had revised their plan and were going to integrate both the eastern and western divisions of Holly Farms transportation department with the Tyson transportation system. The decision was attributed to the discovery of more backhaul freight than was previously thought to be available. Hogg stated it would no longer be necessary to lay off Holly Farms drivers, who, for all intents and purposes, would become Tyson drivers and would

[16] At these meetings, Hogg stated that drivers would not be laid off in the west. Blevins continued to object to any reduction in the driver force in the east, and asked the Respondents to reconsider their decision to remove the Holly Farms drivers in Texas from the bargaining unit.

be paid under the Tyson payscale, but would continue to receive Holly Farms fringe benefits as provided for in the merger agreement between Holly Farms and Tyson. Hogg further informed the Unions that the Holly Farms transportation division would no longer exist upon being integrated into the larger Tyson transportation system, and that the Unions would no longer have majority support in the combined group. Regarding the Respondents' bargaining obligations, Hogg repeated several times Respondent Holly Farms' willingness to bargain about the impact of the integration decision but not about the decision itself, but refused Blevins' request to provide the Unions with a copy of the merger agreement.

Blevins asserted that impact bargaining was not appropriate, and further stated that, in any event, the Unions did not have certain requested information that was necessary for bargaining.

Also on September 12, Respondent Holly Farms sent its drivers a letter stating that Tyson had assumed all long-distance transportation functions. The letter further stated that Holly Farms drivers were being offered employment as Tyson drivers under the Tyson pay plan, but with Holly Farms benefits to be continued as described in the merger agreement. The letter concluded, "Please contact John Sloop on or before *September 22, 1989*, for your processing to become a

Tyson Foods employee." (Emphasis in original.)

The parties continued to exchange correspondence in September and October. In these letters, the Unions requested certain information, including the merger agreement, and demanded bargaining about both the integration decision and the impact of that decision. The Respondents asserted that Holly Farms was willing to bargain about the impact of the integration decision until such time as the integration process was complete, but contended that Tyson had no bargaining obligation because the bargaining unit no longer existed. A copy of the section of the merger agreement relating to employee benefit plans was eventually provided to

the Unions, but the Respondents continued to deny the relevance of the agreement in its entirety.

Relying on the parties' stipulation of fact, set forth above, regarding Tyson's purchase of Holly Farms, the judge found that for 2 months following the purchase nothing changed for the former Holly Farms employees, all of whom were retained on the payroll under their existing wages, hours, and terms and conditions of employment. The judge therefore found that as of July 18, Tyson became Holly Farms' successor and employed a substantial and representative complement of employees. The judge further found that because Respondent Tyson did not exercise its right as a successor to set initial

terms and conditions of employment for the former Holly Farms employees whom it retained, those terms became established and not subject to unilateral change. In so finding, the judge rejected the Respondents' contention, raised as a defense to the successorship allegation, that as of September 22, the Holly Farms drivers and yardmen unit was accreted into the Tyson transportation system and was no longer an appropriate unit. Rather, the judge found that in both the eastern and western divisions, the former Holly Farms drivers continued to be separately identifiable from the Tyson drivers. Based on his findings of successorship and no accretion, the judge found that the Respondents violated Section 8(a)(5)

and (1) by refusing to bargain with the Unions about the August 8 decision, which was later rescinded, to partially integrate the Holly Farms transportation system with the Tyson system, and about the full functional integration decision announced on September 12. The judge further found that the unilateral changes in terms and conditions of employment caused by the integration, including the September 12 job offer to Holly Farms drivers, violated Section 8(a)(5) and (1) and also constituted constructive discharges of the 47 Holly Farms drivers who did not accept employment with Tyson. Finding that the Respondents' conduct on September 12 constituted a withdrawal of recognition from the Unions, the

judge rejected the Respondents' contention that the integration of the former Holly Farms drivers into the larger Tyson transportation system constituted an "unusual circumstance" that justified the withdrawal of recognition during the certification year.[17]

In rejecting this defense, the judge relied on his findings that the unilateral changes resulting from the integration, and the integration process itself, were unlawful refusals to bargain. Included among those unilateral changes he found unlawful was the change in the Holly Farms pension plan, which was to be continued in effect for only 2 years fol-

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[17] See *Brooks v. NLRB*, 348 U.S. 96 (1954).

lowing the integration. Finally, the judge found that the Respondents violated Section 8(a)(5) and (1) by refusing to provide the Unions with a copy of the merger agreement, which he found to be "the most authoritative and reliable source" concerning the continuation of Holly Farms job benefits for those drivers who accepted employment with Tyson.

The Respondents contend that the judge erred in applying successorship principles to the July 18 purchase, which they characterize as a stock transfer which preserved the status of Holly Farms as the employing entity of unit employees.[18] Based on this theory, the Respondents contend

[18] See *Phil Wall & Sons Distributing*, 287 NLRB 1161 (1988).

that only Holly Farms, but not Tyson, had and recognized a continuing obligation to bargain with the Unions immediately following July 18. Successorship principles first became applicable, according to the Respondents, when Tyson made the decision to integrate the Holly Farms and Tyson transportation systems, thereby effecting the substitution of one employer for another that characterizes a successor transaction. Citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Respondents contend that the decision to integrate operations was motivated by sound business judgment, and was not a mandatory subject of bargaining. More specifically, the Respondents maintain that on September 22,

Tyson lawfully established the initial terms and conditions under which it would employ the former Holly Farms drivers, and that it reached a representative complement on September 22, the date by which the employees had to respond to the offer of employment. The Respondents assert, however, that Tyson did not succeed to Holly Farms' bargaining obligation and that the withdrawal of recognition was appropriate because, applying the principles of both accretion and functional integration analyses,[19] the former Holly Farms unit employees became an indistinguishable segment of the Tyson transportation

[19] See, respectively, *Border Steel Rolling Mills*, 204 NLRB 814, 821 (1973), and *Kelly Business Furniture*, 288 NLRB 474, 475 (1988).

work force, and the certified unit was no longer appropriate. Regarding the Unions' request for a copy of the merger agreement, the Respondents contend that although Holly Farms had an obligation to bargain about the effects of the integration decision, the Unions requested this document in connection with their demand for decision bargaining, and did not demonstrate its relevance as to effects bargaining. Finally, the Respondents contend that the terms of the Holly Farms Retirement Plan provided the Employer with the right to discontinue the plan, and therefore that its termination was not an unlawful unilateral change.

The Board has addressed the distinction between a "successorship,"

which contemplates the substitution of one employer for another, and a "stock transfer," which involves the continuing existence of a legal entity, but under new ownership. *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1083 fn. 4 (1979). The effect of a change in ownership on labor obligations is, however, a matter to be considered on the specific facts of a particular case. *EPE, Inc. v. NLRB*, 845 F.2d 483, 490 (4th Cir. 1988), enfg. in pertinent part 284 NLRB 191 (1987). Recognizing that a stock sale could serve as a vehicle for the acquisition of resources that will be used to operate a substantially different enterprise from that conducted by the original owners, the court in *EPE* posited:

> Where the corporate form survives only in name, but an entirely new operation replaces the old, the corporation might not be fairly termed a "continuing" employer in any practical sense. Should substantial changes in an operation indicate that its sale was not a "mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise," the obligations of the employer may be governed by successorship principles rather than by continued enforcement of an agreement. [845 F.2d at 490 (citation omitted).][20]

We agree with the judge's finding that Respondent Tyson became a suc-

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[20] For example, the Board has applied a successorship analysis to determine the bargaining obligation of a corporation that continued to exist, but as an integrated subsidiary of the larger purchasing corporation and with some alteration of its business operation. See *Spencer Foods*, 268 NLRB 1483 (1984), enf. granted in part sub nom. *Food & Commercial Workers Local 152 v. NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985). We note that both the Board and the court in *Spencer Foods* applied successorship principles, but disagreed as to whether there was substantial continuity of operations.

cessor of Holly Farms when it purchased a controlling interest in the corporation on July 18, and that its bargaining obligation arose on that date because it employed a substantial and representative complement of unit employees. Tyson's purchase of Holly Farms stock involved at the outset a broader form of reorganization than a mere stock transfer.

Although Holly Farms continued to exist as a corporate entity, the following factors indicate that at the time of the July 18 stock purchase, Tyson began to implement steps that would result in its substitution as the employing entity of the unit employees. We note that Tyson's initial bid for Holly Farms was made in October 1988, and as early as January

1989, Tyson officials began formulating tentative plans for integrating the Holly Farms and Tyson transportation divisions. As detailed by the judge, "upon Tyson's assumption of control, key Holly Farms executives almost immediately were absorbed into the Tyson organization," and performed their duties as part of the Tyson management team and in accordance with Tyson's dictates. Additionally, at the time of the stock purchase, negotiations between the Unions and Holly Farms were suspended to enable Respondent Holly Farms to clarify its status and bargaining position. To that end, on July 14 and 15, management representatives from Holly Farms and Tyson met to discuss the status of the collective-

bargaining negotiations, and also Tyson's corporate goals, which became the basis for the subsequent integration plans. The judge found that Holly Farms President Lovette consulted with Tyson officials before instructing the Respondents' attorney, Hogg, on how to present information about integration to the Unions. When collective-bargaining negotiations resumed on August 8, Tyson officials were present to answer questions about the operational changes that Tyson planned to implement. We find, contrary to the Respondents' contention, that Tyson's involvement in the operation of the Holly Farms transportation division as of the time of its acquisition warrants the

application of successorship principles as of that date.

Regarding the September 12 offer of employment to the former Holly Farms drivers, having adopted the judge's successorship findings, we also adopt his finding that Respondent Tyson did not exercise its right at the time it purchased Holly Farms to set initial terms and conditions of employment for the former Holly Farms employees and, therefore, that it could not unilaterally change those terms on September 12. Further, as discussed below, although we agree with the Respondents that the decision to functionally integrate the Holly Farms and Tyson transportation departments was not a mandatory subject of bargaining, we disagree

with their related contention that Respondent Tyson therefore lawfully commenced integration when it offered the Holly Farms drivers employment as Tyson employees without first bargaining with the Unions.

The Supreme Court in *First National Maintenance Corp. v. NLRB*, above, set forth principles for determining whether a given management decision is a mandatory subject of bargaining. Applying those principles here, we find that the Respondents' decision to integrate the transportation division of Holly Farms with the Tyson transportation system falls within the third category of management decisions identified by the Court, those which have a direct impact on employment but have as their focus

only the economic profitability of the business. Such decisions, according to the Court, involve a change in the scope and direction of the business and are akin to the decision whether to be in business at all. For these decisions, the Court held that bargaining would be required "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 676-679.

The Respondents' testimony at the hearing established that the integration decision had as its focus a desire to improve the economic profitability of the former Holly Farms long-haul transportation division. As described by Charles Irwin, Tyson

group vice president of distribution and commodity purchasing, Tyson's transportation system, which was run like a common carrier, generated significant backhaul revenue[21] and was a profit center within the corporation. To achieve this result, Tyson hauled its own products only into areas where it had established backhaul customers, and relied on common carriers to transport its products to areas without backhaul loads, thereby minimizing its empty mileage ratio. According to Irwin, the Holly Farms transportation department, by contrast, existed primarily to transport Holly Farms' products to customers, had a substantial amount of empty

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[21] "Backhaul" refers to the delivery of products for other companies as part of the return trip to the Tyson facilities.

mileage on the backhaul portion of its business, and was losing money. Irwin testified that Tyson hoped, through integration of the transportation departments and application of the Tyson corporate philosophy and policies, to decrease Holly Farms' empty mileage ratio and increase its backhaul revenues with an eye toward earning a profit. Based on Irwin's uncontroverted testimony, we find that the planned functional integration had as its focus the economic profitability of Holly Farms' transportation division, and involved a change in the scope and direction of the division. See *First National Maintenance*, above.

Having found that the integration decision was economically motivated,

we next apply the balancing test described in *First National Maintenance* to determine whether the Respondents had an obligation to bargain about the decision. There is no indication that the decision here was motivated by a desire to reduce labor costs, a matter which the Court has found to be "peculiarly suitable for resolution within the collective bargaining framework."[22] Moreover, requiring bargaining over the integration decision would place a significant burden on the Respondents because, as explained by Irwin, the integration process involved structural and operational changes designed to make the

[22] See the Court's discussion in *First National Maintenance*, *id.* at 680, of the application of a balancing test in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 213-214 (1964).

former Holly Farms transportation division operate like a common carrier.[23] Additionally, implementation of the integration decision required the expenditure of capital.[24] For these reasons, we find that the burden on the conduct of the business outweighs any benefit that might be gained from the Unions' participation in the decision and, therefore, that the September 12 integration decision was not a mandatory subject of bargaining. Accordingly, we reverse the judge's finding that the Respondents violated Section 8(a)(5) and (1) by

[23] For example, the former Holly Farms drivers, who had previously followed established routes, began to make multiple-leg trips in order to generate backhaul revenue.

[24] New central terminals, for example, were built in the eastern and western division of the former Holly Farms transportation department.

failing to bargain about the integration decision.

The Board has recognized, however, that employers may be obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain. *Litton Business Systems*, 286 NLRB 817, 819-821 (1987), enfd. in pertinent part 893 F.2d 1128 (9th Cir. 1990) (citing *First National Maintenance*, above).[25] Here, we find that the Respondents had an obligation to bargain over the decision to offer Holly Farms drivers

[25] In *Litton*, the Board found that an *employer's* decision to lay off employees was bargainable as an effect of a decision to transfer certain work and convert operations. See also *Paramount Poultry*, 294 NLRB 867, 869-870 (1989) (decisions to reduce the workweek and to lay off employees bargainable as effects of the decision to terminate part of product line and customer base).

employment as Tyson employees under Tyson terms and conditions of employment as an effect of the integration decision. In so finding, we note that the terms at which the Holly Farms drivers were offered employment were not an inevitable consequence of the functional integration of the transportation departments, but were only "one of a number of responses to changed circumstances." *Litton*, 286 NLRB at 820. The Respondents were therefore required to give the Unions notice and an opportunity to bargain about the various ways in which the integration might affect the employment status and wages and benefits of the former Holly Farms drivers.

An examination of the correspondence exchanged between the Unions

and the Respondents in September and October makes clear that the Unions repeatedly requested bargaining about both the integration decision and its effects, and requested certain information, including the merger agreement, which they contended was necessary for effective bargaining. The Respondents maintained throughout that Tyson had no bargaining obligation with respect to the Unions because the bargaining unit was no longer appropriate. Respondent Holly Farms indicated a willingness to bargain about the "impact" of the integration decision until such time as integration was complete, but asserted the Respondents' right to make the September 12 unilateral changes in terms and conditions of employment

as part of the integration decision and indicated that those changes would not be rescinded.

The Respondents also refused to provide the requested information, contending that the Unions did not demonstrate its relevance to effects bargaining.[26] Under the circumstances, including our finding that Respondent Tyson was obligated to bargain as a successor employer as of July 18, we find that the Respondents violated Section 8(a)(5) and (1) by refusing to bargain about the September 12 offer of employment to the Holly Farms unit employees as an ef-

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[26] We agree with the judge, for the reasons stated in his decision, that the Respondents violated Sec. 8(a)(5) and (1) by refusing to provide the Unions with a complete copy of the merger agreement between Holly Farms and Tyson.

fect of the integration decision. We further find that the Respondents unlawfully conditioned employment on the acceptance of Tyson terms and conditions of employment, thereby discharging 47 employees in violation of Section 8(a)(5) and (1). See *Tuskegee Area Transportation System*, 308 NLRB No. 47, slip op. at 4-5 (Aug. 14, 1992).[27]

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[27] In finding that the Respondents unlawfully conditioned employment, Members Devaney and Oviatt do not adopt the judge's finding that the 47 employees were constructively discharged. See *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

Chairman Stephens, unlike his colleagues, agrees with the judge that the employees were constructively discharged. He does not rely, however, on those constructive discharge cases cited by the judge (exemplified by *Mfg. Services*, 295 NLRB 254 (1989)), in which the theory is that an employer intentionally sought, out of discriminatory motives, to rid it-

(continued...)

We have found that Respondent Tyson became a successor of Respondent Holly Farms on July 18, and that the

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[27](...continued)
self of an employee through the imposition of working conditions so difficult or unpleasant as to induce the employee to quit. Id. at 255 and cases there cited. Instead, Chairman Stephens relies on another line of cases finding constructive discharges on the ground that the employees in question quit because the employer had presented them with a choice between quitting or remaining employed under terms and conditions of employment established in derogation of their statutory rights. See e.g., *Control Services*, 303 NLRB 481, 485 (1991), enfd. mem. 975 F.2d 1551 (3d Cir. 1992); *White-Evans Service Co.*, 285 NLRB 81, 81-82 (1987).

We adopt the judge's finding that the Respondents also violated Sec. 8(a)(5) and (1) by dealing directly with unit employees concerning terms and conditions of employment. We find it unnecessary, however, to pass on the Respondents' bargaining obligations with respect to the August 8 partial integration decision, which was rescinded shortly thereafter. We note that, in any event, there were no bargainable effects of this decision, which was never implemented.

Respondents had an obligation to bargain about the September 12 offer of employment to the Holly Farms employees as effects of the integration decision. In so finding, we reject the Respondents' contention that Respondent Tyson had no obligation to bargain with the Unions because the unit employees were completely assimilated into the larger Tyson transportation work force, and the bargaining unit ceased to be appropriate. We adopt the judge's conclusions that the bargaining unit did not lose its separate identity under either an accretion analysis, or under the Respondents' related contention that the functional integration of the transportation departments constituted an "unusual circumstance" that would

justify the withdrawal of recognition during the certification year, but we do so only for the following reasons.

First, the Board has found that in determining whether accretion is proper, unless there is a well-defined plan or timetable for achieving full functional integration of operations, the changed nature of the operation should be assessed at the time the withdrawal of recognition occurred. *Northland Hub, Inc.*, 304 NLRB No. 84, JD slip op. at 23-24 (Aug. 27, 1991). In this case, the judge found, and we agree, that the Respondents withdrew recognition on September 12 when they announced the plans for integration and stated that upon such integration the bargaining unit would cease to exist. Signifi-

cantly, Tyson Vice President Irwin admitted that, as of that date, there was no detailed plan for the integration of the transportation departments. When questioned as to what was actually done after the September 12 meeting with the Unions "by way of combining these operations," Irwin responded, "We drafted out a rough outline of what we would do to implement and some timeframes that we felt like that we could get this integration process put in place by." Under the circumstances here, where at the time of the withdrawal of recognition there was no integration of operations or even detailed plans for implementation of the integration, we find that the Respondents are not entitled to rely on Tyson's future

plans for the Holly Farms transportation department to justify refusing to bargain with the Unions. See also *Phil Wall & Sons Distributing*, above; *EPE, Inc.*, 284 NLRB 191, 199 fn. 9 (1987), enfd. in pertinent part 845 F.2d 483 (4th Cir. 1988).[28]

Second, as found by the judge, many of the factors relied on by the Respondents to support their contention that the bargaining unit no longer remained appropriate were un-

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[28] Concerning the Respondents' reliance on the integration of Holly Farms' and Tyson's operations, we note that such integration does not necessarily—and does not here—negate the separate identity of the drivers' and yardmen's unit. See *Bowie Hall Trucking*, 290 NLRB 41, 42 (1988) (companywide unit in trucking operation not the only appropriate unit even though wages and fringe benefits were both uniform and centrally determined and a single employee manual/driver handbook applied to all employees).

lawful unilateral changes.[29] See *Armco., Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987), enfg. in pertinent part 279 NLRB 1184 (1986). Finally, our finding that the Respondents' withdrawal of recognition from the Unions was not justified is further supported by the fact that the unlawful changes occurred during the certification year.

Although we have found that the Respondents were obligated to bargain with the Unions about the offer of employment to the Holly Farms employees under Tyson terms and conditions of employment as effects of the non-

[29] Specifically, the judge cited as examples the unilateral changes in pay, work locations, schedules, and other terms of employment resulting from the integration. We have found that the Respondents had an obligation to bargain over these subjects as effects of the integration decision.

mandatory integration decision, we find merit in the Respondents' contention that its announcement to employees that the Holly Farms Retirement Plan would be terminated 2 years after the Tyson acquisition was not unlawful.[30] Section 7.02 of the Holly Farms Retirement Plan, which we have accepted into evidence, provides in pertinent part, "Although it is expected that the Plan will be continued indefinitely, each Employer reserves the right to at any time terminate the Plan by action of its board of directors and to discontinue all contributions hereunder." In *St. Marys Foundry Co.*, 284 NLRB 221

[30] The judge found that the employees were notified of this change on September 12, and again in December correspondence and at a January 1990 meeting.

at 231 and 233 (1987), enfd. 860 F.2d 679 (6th Cir. 1988), the Board relied on a similar clause, by which the employer reserved the right of termination under the terms of the pension plan, to find that the successor employer's cessation of the plan did not violate the Act. We further note that here, there was no collective-bargaining agreement in effect between Respondent Holly Farms and the Unions that could restrict the Respondents' right to terminate the plan. Accordingly, we reverse the judge and find that the Respondents did not violate Section 8(a)(5) and (1) by unilaterally changing, with the intent of terminating in 2 years, the Holly Farms Retirement Plan.

4. The judge found that on March 31, Local 391 achieved majority status in the live haul unit. He further found that the Respondents' unfair labor practices justified a *Gissel*[31] bargaining order with respect to that unit. In so finding, the judge discussed the unfair labor practices committed by the Respondents against the live haul employees. Citing *J. P. Stevens, Inc.*, 239 NLRB 738, 770 (1978), modified 623 F.2d 322 (4th Cir. 1980), he also relied on the Respondents' unlawful conduct directed toward nonunit employees, including drivers and production employees, to justify imposing a bargaining order in the live

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[31] ***NLRB v. Gissel Packing Co.***, 395 U.S. 575 (1969).

haul unit. The Respondents dispute the judge's finding of majority status; they contend that even if Local 391 achieved majority status, a bargaining order is not warranted here; and maintain that the judge's reliance on unfair labor practices affecting nonunit employees was misplaced. We adopt the judge's imposition of a bargaining order, but with the following modifications.[32]

A showing of majority status is a prerequisite to the imposition of a *Gissel* bargaining order. *Philips Industries*, 295 NLRB 717, 718 fn. 10 (1989). In support of their position

[32] The election was held in the live haul unit on July 27. We adopt the judge's recommendation that the election should be set aside because Respondent Holly Farms engaged in unlawful conduct that was alleged to be objectionable and that interfered with free choice in the election process.

that the Union did not achieve majority status, the Respondents contend that 6 of the 103 authorization cards submitted by the General Counsel should not be counted because of deficiencies concerning the dates and/or signatures that appear on the cards. The Respondents further contend that two additional cards should not be counted because they were signed by persons who were not part of the unit during the relevant period of time. As will be discussed, we agree with the judge that the Union achieved majority status in the live haul unit, but we find that such status was achieved as of June 28, and not March 31.

The parties stipulated that on March 31, 1989, there were 103

authorization cards and that the cards were authentic as to signatures and dates. The parties also stipulated that there were 201 unit employees at that time. The judge relied on the stipulation to find that on March 31, a majority of unit employees had authorized the Union to represent them by signing cards. We find, in agreement with the Respondents, that the judge erred in interpreting the stipulation as including majority status. Here, the plain meaning of the stipulation is that the parties agreed to the *authenticity* of the cards, i.e., that the cards were executed by those persons whose signatures appear on them and were signed on the dates indicated. See *Zero Corp.*, 262 NLRB 495, 499

(1982), enfd. mem. 705 F.2d 439 (1st Cir. 1983); *Ona Corp. v. NLRB*, 729 F.2d 713 (11th Cir. 1984).[33]

The Respondents maintain in their exceptions that Michael Sturgill's 1988 card[34] should not be counted because his first name is misspelled on the signature line and is printed, and because the handwriting on the signature line is not the same as the handwriting on the remainder of Sturgill's two cards. The Respondents also maintain that the name on a card

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[33] Our finding, based on the unambiguous language of the stipulation, is further supported by statements made at the hearing by the Respondents' counsel at the time the parties entered into the stipulation. He stated, "I mean whatever is the date on the card and the signature on the card is authentic."

[34] The 103 cards submitted by the General Counsel include two cards for Michael Sturgill (reflecting the same social security number), one dated February 7, 1988, and one dated July 16, 1989.

purportedly signed by Dennis Johnson is misspelled, and that another card displaying the name "Arnold Clonch" is signed by "Arnold Stanley," and, therefore, that these two cards should also be excluded. We find, however, that having stipulated to the authenticity of the cards, the Respondents cannot now question the authenticity of signatures that appear on them.[35] The Board has held that it is generally accepted that a stipulation is conclusive on the party making it, and prohibits any further dispute of the stipulated fact by that party or use of any evidence to disprove or contradict it. *Kroger Co.*, 211 NLRB 363, 364 (1974). Noting that the parties' stipulation is not ambiguous, we decline to discount any of the authorization cards on the basis of questions about their authenticity.

[35] See *Zero Corp.*, above, in which the authorization cards were authenticated at the hearing by a handwriting expert without objection from the respondent. The respondent later contended in its brief to the judge that many of the cards were invalid because the dates were not filled in by the signers. The Board found, however, that the respondent, having reexamined the cards, could not question their authenticity for the first time in its posthearing brief.

The Respondents next contend that three cards should not be counted because they were signed *after* the stipulated date of March 31: Timothy Williams' card dated June 26, 1989, Clifton Johnson's card dated June 28, 1989, and Michael Sturgill's card dated July 16, 1989. The Respondents also maintain that Sturgill's February 7, 1988 card should not be counted because it was signed before the

Union's organizing campaign began in December 1988. Where, as here, a bargaining order is based on violations of Section 8(a)(1) rather than on a demand for bargaining, bargaining is ordered as of the earliest possible date when both of the following conditions are met: the respondent has commenced its unlawful conduct *and* the union has attained majority status. See *Multimatic Products*, 288 NLRB 1279, 1321 fn. 278 (1988); *Ultra-Sonic De-Burring*, 233 NLRB 1060 fn. 1 (1977), enfd. 593 F.2d 123 (9th Cir. 1979). Thus, in this case, despite the stipulated date of March 31, which the judge interpreted as the date of majority status, he ordered bargaining from April 3, which he found to be the

date the Respondents commenced their course of unlawful conduct. Further, although the parties have stipulated to the authenticity of the dates that appear on the cards (i.e., that the cards were signed on the dates that appear on them), an examination of those dates for the purpose of determining when the Union attained majority status concerns a legal question—and *not* matters relating to authenticity—that is properly before the Board now. See *Burger King*, 258 NLRB 1293, 1300 (1981), enfd. mem. sub nom. *NLRB v. Greyhound Food Management*, 709 F.2d 1506 (6th Cir. 1983).

Examining the dates on the cited cards, we agree with the Respondents that Michael Sturgill's 1988 card

should not be counted because it was not signed during the Union's organizing campaign. See *Fort Smith Outerwear*, 205 NLRB 592, 594 (1973), modified on other grounds 499 F.2d 223 (8th Cir. 1974).[36] Additionally, we find that the cards of Williams and Johnson and Sturgill's 1989 card should be counted toward majority status as of the dates that appear on them. Thus, after discounting Sturgill's 1988 card and counting Williams' card as of June 26 and Johnson's card as of June 28, we find that the Union attained a majority of

[36] In *Fort Smith*, the Board found that the General Counsel did not meet his burden of proving that the card was signed on a date other than that appearing on its face (December 3, 1970), which was not during the organizational campaign that commenced on November 30, 1971.

101 cards, in a unit of 201 employees, as of June 28.[37]

The Respondents also contend that the cards of two other employees should not be counted in determining majority status. According to the Respondents, Randy Nichols was terminated on May 3 and his card should not be used to determine majority status after that date. Additionally, they contend that the card signed by Harley J. Perry Jr. should not be counted because Perry had been employed as a guard since 1976, and therefore was not part of the unit. We have denied the Respondents' motion to reopen the record to admit

[37] In making this finding, we note that the Respondents in fact state in their brief that "the earliest possible date of the Union's majority status was June 28."

evidence relevant to the employment status of Perry and Nichols. The Respondents attribute their failure to raise the majority status before the judge to the General Counsel's failure "to reasonably ascertain the accuracy" of the authorization cards before introducing them into evidence. However, as discussed, the Respondents at the hearing stipulated to the authenticity of the cards and raised no issues concerning their validity. We find that the Respondents' failure to realize the significance of the evidence at the time of the hearing, and to present evidence which was apparently readily available at that time, does not constitute the sort of extraordinary circumstances that would warrant re-

opening the record under Section 102.48(d)(1) of the Board's Rules and Regulations. See *Superior Fast Freight*, 275 NLRB 329 fn. 1 (1985).[38]

Having found that the Union attained majority status in the live haul unit as of June 28, we agree with the judge that a bargaining order is warranted. In determining whether a bargaining order is appropriate to protect employee sentiments and to remedy an employer's misconduct, the Board examines the nature and pervasiveness of the employer's practices. In weighing a violation's

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[38] Moreover, noting that the Respondents contend that Perry was not a unit employee and that Nichols was not a unit employee after May 3, we find that even if their cards were not counted toward a determination of majority status, the Union would have attained a majority of 100 cards in a smaller unit of 199 employees by July 16, the date of Sturgill's second card.

pervasiveness, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice. *FJN Mfg.*, 305 NLRB No. 79, slip op. at 5 (Nov. 21, 1991).

In finding a bargaining order appropriate here, we rely particularly on Respondent Holly Farms' unlawful grant of economic benefits to the live haul employees, conduct which was also emphasized by the judge. We have also adopted the judge's finding that following the Unions' certification in the drivers and yardmen unit, Live Haul Manager Lovette engaged in a pervasive pattern of unlawful in-

terrogations, solicitations, and promises to remedy grievances among the live haul employees. The judge found that in response to concerns expressed by live haul employees about inadequate pay due to their 4-day workweek, Respondent Holly Farms increased their work hours beginning in May. Addressing the same employee concerns was the Respondents' July 2 wage increase, which we have found to be coercive. The solicitation of grievances and promises to remedy them and the grant of wage increases have a strong coercive effect on employee freedom of choice because they eliminate primary reasons for organization. *Montgomery Ward & Co.*, 288 NLRB 126, 129 (1988), enf. denied on other grounds 904 F.2d 1156 (7th Cir.

1990). Additionally, wage increases in particular have been recognized as having a potential long-lasting effect, not only because of their significance to employees, but also because the Board's traditional remedies do not require a respondent to withdraw benefits. *Color Tech Corp.*, 286 NLRB 476, 477 (1987).[39] As the judge in this case discussed, because the increases regularly appear in paychecks, they are a continuing reminder that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not

[39] See also *Pembrook Management*, 296 NLRB 1226, 1228 (1989), in which the Board discussed cases in which bargaining orders were given based solely on the grant of wage increases in reaction to union organizing campaigns.

obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Significantly, in terms of pervasiveness, the Respondents' wage increase affected all the unit employees.[40]

For these reasons, we find that the Respondents' unfair labor practices affecting the live haul employees had the tendency to undermine majority strength and impede the election processes, thereby rendering it unlikely that traditional remedies would erase the effects of the unlaw-

[40] We reject the Respondents' contention that the wage increase and workweek extension cannot be characterized as either serious or pervasive because they occurred after the March 27 dismissal of the representation petition in the live haul unit and at a time when Respondent Holly Farms believed that no election was pending in the live haul unit. Although conduct does not have to occur during the critical period to be relevant to determination of whether a *Gissel* bargaining order is appropriate, we note that here the unlawful economic changes in fact occurred *after* the representation petition had been reinstated on April 28.

ful conduct and ensure the conduct of a fair election. *NLRB v. Gissel Packing Co.*, above.

We further find, in agreement with the judge, that under the circumstances here, the Respondents' unfair labor practices directed against employees in other units provide further support for the issuance of a bargaining order in the live haul unit. The judge found, and we agree, that it is appropriate to consider these unfair labor practices for the following reasons: (1) the Respondents' conduct was concentrated and principally affected employees in the Wilkesboro complex where the live haul facilities were contiguous with the plants and, before the integration, were contiguous with the east-

ern division transportation department; (2) the Respondents' labor relations policies were centrally controlled and the September withdrawal of recognition from the Unions was overt and highly publicized; and (3) the Respondents did not try to conceal from the live haul employees their unlawful conduct affecting employees in other units, and in fact called some of that conduct to the attention of the live haul employees in order to discourage their union activities. Regarding the latter, the judge found that Vice President Lankford told live haul employees about the arrests of the drivers for

engaging in union handbilling in the parking lots.[41]

As found by the judge, the unfair labor practices directed at nonunit employees included threats of closure and job loss by high level officials, as well as the unlawful discharge of four employees for engaging in pro-union activities on nonworktime in nonwork areas. The Board has emphasized, with court approval, that threats of plant closure and discharge not only are "hallmark" violations, but are among the most fla-

[41] We do not, however, rely on the judge's citation to *J. P. Stevens*, above, which we find to be factually distinguishable.

Cf. *Action Auto Stores*, 298 NLRB 875 (1990) (bargaining order given at each of the nine stores involved in the election based on unfair labor practices at six of those stores, even in the absence of a finding that knowledge of the respondent's actions was disseminated).

grant of unfair labor practices. *Q-1 Motor Express*, 308 NLRB No. 185, slip op. at 3-4 (Sept. 30, 1992) (and cases cited therein). Further, the Respondents' unlawful 8(a)(5) conduct with respect to the drivers and yardmen unit following the Tyson purchase, including the unlawful withdrawal of recognition and imposition of Tyson terms and conditions of employment, were conspicuous and pervasive and positioned the Respondents to gain an advantage in the event of a new election.[42]

We also find, contrary to the Respondents' contention, that evidence

[42] In view of the totality of the Respondents' unlawful conduct, which was both serious and pervasive, we reject the Respondents' reliance on the election tally to support its contention that a bargaining order is not warranted because the Union's majority status was not dissipated. Cf. *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991).

concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order and, even if considered, would not require a different result. See *F & R Meat Co.*, 296 NLRB 759 (1989). Finally, we note that the Respondents have presented no evidence to support their contention that a bargaining order is not appropriate because there have been changes in management.[43]

Accordingly, we agree with the judge that the possibility of erasing the effects of the Respondents' extensive and serious violations is slight and the holding of a fair re-

[43] As indicated, we have denied the Respondents' motion to reopen the record to present evidence regarding employee turnover and a change in management of the live haul employees.

run election unlikely. Therefore, we conclude that a *Gissel* bargaining order is appropriate as of June 28, the date by which we have found the Union attained majority status in the live haul unit.[44]

CONCLUSIONS OF LAW

1. The Respondents, Tyson Foods, Inc./Holly Farms Corporation, each are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[44] Among the unlawful unilateral changes found by the judge was the Respondents' October 1 change in the absentee policy for live haul employees. The Respondents contend that although the judge set forth the facts relating to this allegation, he did not explicate the basis for his finding, appearing only in the Conclusions of Law, that this change was unlawful. Relying on our imposition of a bargaining order in the live haul unit, we find that the Respondents had an obligation to bargain with the Union before changing the absentee policy. We therefore find, in agreement with the judge, that the Respondents violated Sec. 8(a)(5) and (1) by unilaterally changing the policy.

2. Respondent Tyson Foods, Inc., at all material times since July 18, 1989, has been the successor to and proprietor of Respondent Holly Farms Corporation, succeeding to Holly Farms' bargaining obligation with the labor organizations named below, and shares with Holly Farms joint and several liability to remedy Holly Farms' unfair labor practices.

3. Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 592, 657, and 988, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Unions) are labor organizations within the meaning of Section 2(5) of the Act.

4. The Respondents violated Section 8(a)(1) of the Act by:

(a) Repeatedly threatening their long-distance drivers that the transportation department in which they were employed would be closed if they chose the Unions as their bargaining agent.

(b) Repeatedly threatening their long-distance drivers that if the Unions won, or even lost, the forthcoming representation election, the Respondents would take away the employees' jobs by selling all their trucks and by contracting out their hauling work.

(c) Repeatedly soliciting grievances from their employees and promising directly, or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Telling their employees that it would be futile for them to support the Unions.

(e) Repeatedly threatening their employees with unspecified reprisals for having supported the Unions.

(f) Telling their employees to abandon the Unions in favor of forming a committee to negotiate with management concerning terms and conditions of employment.

(g) Promulgating, maintaining, and disparately enforcing a rule which prohibits employees from distributing materials in nonwork areas on the Respondents' property during nonwork hours.

(h) Threatening to arrest their employees for distributing union mate-

rials in nonwork areas on the Respondents' property during nonwork hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(j) Threatening their employees with discharge should they distribute union materials in nonwork areas of the Respondents' premises during nonwork hours.

(k) Promulgating, maintaining, and enforcing a rule which prohibited their employees from discussing wages with other employees.

(l) Threatening to retaliate against their employees by assigning them less mileage, thereby reducing earnings, because they chose the

Unions as their bargaining representative.

(m) Repeatedly coercively interrogating their employees concerning their union activities, sympathies, and desires.

(n) Threatening employees with retaliation for wearing union hats.

(o) Threatening their employees with discharge if they should choose the Unions as their bargaining agent.

(p) Threatening their employees that other employees who were prominently active for Local 391 would be discharged should the employees not choose the Union as their bargaining agent.

(q) Threatening their employees that the Respondents' management would know how they voted in the

scheduled representation election should they chose Local 391 to be their bargaining agent.

5. The Respondents, in order to discourage union membership and activities, violated Section 8(a)(3) and (1) of the Act by:

(a) Discriminatorily discharging their employees Alvin Bouchelle, Patricia Barker, Raymond K. Huffman Jr., and Joseph Richardson.

(b) Discriminatorily disciplining their employees James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome by the issuance of written warnings.

(c) Causing employees to be arrested for distributing union materials in nonwork areas on the Respondents' property during nonworktime.

(d) Discriminatorily granting their live haul unit employees a pay raise shortly before a scheduled representation election.

6. The following employees of the Respondents constitute an appropriate unit for bargaining under Section 9 (a) of the Act:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors as defined in the Act.

7. At all times since March 24, 1989, the seven above-named Teamsters

Local Unions (the Unions) have been, and are, the exclusive jointly certified representative of the employees in the above-described unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. The Respondents violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing to bargain about the September 12, 1989 offer of employment to the Holly Farms unit employees as an effect of the integration decision.

(b) Unlawfully conditioning employment on the acceptance of Tyson terms and conditions of employment, thereby discharging the following employees:

Earl Howell
Fred Royal

Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy

Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

(c) Bypassing the Unions and negotiating directly with unit employees concerning their wages, hours, and other terms and conditions of employment.

(d) Unilaterally changing the wages, hours, work locations, and other terms and conditions of employees in the above-described unit.

(e) Withdrawing recognition from the Unions as the exclusive collective-bargaining representative of the employees in the above-described unit and, thereafter, by failing and refusing to recognize the Unions as the exclusive collective-bargaining representative of the unit employees.

(f) Failing and refusing to provide the Unions with a copy of the requested merger agreement between Tyson Foods, Inc. and Holly Fars Corporation.

(g) Unilaterally changing the absentee policy as to when live haul employees must report their absences to the Respondents to avoid discharge.

9. The strike that began on October 1, 1989, is a protected unfair labor practice strike caused by the Respondents' above-described unfair labor practices.

10. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All live haul employees (chicken catching crews)

> employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

11. On or about June 28, 1989, Local Union No. 391, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Union), separately represented a majority of the employees in the unit described immediately above and, since that date, has been the exclusive representative of all such employees for purposes of collective bargaining.

12. By virtue of its unfair labor practices, the Respondents have attempted to undermine the Union's ma-

jority status and have precluded the holding of a fair rerun election, thereby making a bargaining order an appropriate remedy.

13. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

14. The Respondents' unlawful conduct interfered with the representation election held on July 27, 1989, in Case 11-RC-5583.

AMENDED REMEDY

1. Substitute the following for line 16 of paragraph 3 of the judge's remedy:

> "to those employees sums equal to the difference between what they would have earned from mileage."

2. In paragraphs 4 and 6 of the judge's remedy, change all references

to "constructive discharges" to "discharges."

3. Delete paragraph 8 of the judge's remedy.

4. Substitute the following for paragraph 9 of the judge's remedy:

> "Having found that the Respondents unlawfully changed the absentee policy with respect to live haul employees, the Respondents should, on request, rescind the unilaterally changed policy and baryain with Local 391 regarding absentee call-in requirements."

ORDER

The National Labor Relations Board orders that the Respondents, Holly Farms Corporation and Tyson Foods, Inc., Wilkesboro, Monroe, and Roaring River, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center, Seguin, and Carthage, Texas, their officers,

agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening their employees that the departments in which they are employed will be closed if they should choose Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 657, 592, and 988, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Unions), or any other labor organization, as their bargaining agent.

(b) Threatening their employees that, whether or not they choose the Unions as their bargaining agent, the Respondents will take away their jobs by selling the trucks they drive and by subcontracting their hauling work.

(c) Soliciting grievances from their employees and promising, directly or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Informing their employees that it would be futile for them to join or support the Unions, or any other labor organization.

(e) Threatening their employees with unspecified reprisals for having supported the Unions.

(f) Advising their employees to abandon the Unions in favor of forming a committee to negotiate with the Respondents with respect to wages, hours, and other terms and conditions of employment.

(g) Establishing, maintaining, and disparately enforcing a rule which

prohibits their employees from distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(h) Respectively, threatening their employees with arrest and causing their employees to be arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(j) Threatening their employees with discharge should they distribute union materials in nonwork areas of the Respondents' premises during nonwork hours.

(k) Establishing, maintaining, and enforcing a rule which prohibits their employees from discussing their pay rates with each other.

(l) Retaliating against their employees by assigning them less mileage, and thereby lessening earnings, because they chose the Unions as their bargaining representative.

(m) Coercively interrogating their employees concerning their union activities, sympathies, and desires.

(n) Threatening employees with retaliation for wearing union hats.

(o) Threatening their employees with discharge should they choose the Unions as their collective-bargaining agent.

(p) Threatening their employees that other employees who were active

for Local 391 would be discharged should the employees not choose that Union as their bargaining agent.

(q) Threatening their employees that the Respondents' management would know how they voted in a scheduled representation election should they choose a union as their bargaining agent.

(r) Discouraging membership in a labor organization by discharging employees, issuing written warnings to their employees for engaging in union activities, and discriminatorily granting their employees special pay raises.

(s) Conditioning employment on the acceptance of unlawful unilaterally imposed terms and conditions of em-

ployment, thereby discharging employees.

(t) Refusing to recognize and, on request, to bargain with the above-named Unions as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

(u) Refusing to bargain with the Unions about offering employment to

unit employees under changed terms and conditions of employment as an effect of the integration decision.

(v) Refusing to bargain with the Unions by bypassing the Unions and negotiating directly with unit employees concerning wages, hours, and other terms and conditions of employment; unilaterally changing wages, hours, and terms and conditions of employment; withdrawing recognition from the Unions; and failing and refusing to provide the Unions with a copy of the merger agreement.

(w) Unilaterally changing the absence policy for live haul employees.

(x) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights

guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain, on request, with Teamsters Local Unions Nos. 29, 71, 355, 391, 592, 657, and 988 as the exclusive collective-bargaining representative of their employees in the drivers and yardmen bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle, Joseph Richardson, and the 47 employees whose employment was unlawfully

conditioned, immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and other benefits resulting from their unlawful action against them in the manner set forth in the remedy section of the judge's decision, as amended. The 47 discharged employees entitled to this remedy are:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin

Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

(c) Rescind the written warnings previously given to James Phillip

Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome, and remove from their records any reference to the above discharges, written warnings, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and notify each affected employee, in writing, that this has been done and that such discharges, written warnings, and/or discipline shall not be used against them in any way.

(d) On request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits, and other terms and conditions of employment made on and after September 22, 1989, affecting employees in the drivers and yardmen unit, retroactively to September 22, 1989,

or whenever such changes became effective, except that employees need not be relocated, and make the unit employees whole, with interest, for any losses sustained due to the Respondents' unlawfully imposed changes in wage rates, hours of work, road fees, job benefits, and other terms and conditions of employment, since the effective dates of these unlawful changes, in the manner set forth in the remedy section of the judge's decision, as amended.

(e) Recognize and bargain, on request, with Local 391 as the exclusive collective-bargaining representative of the employees in the following unit appropriate for bargaining with respect to wages, hours, and other terms and conditions of employ-

ment and, if an understanding is reached, embody such understanding in a signed agreement:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

(f) On request, rescind the unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, live haul employees must communicate their absences to the Respondents within 2 days instead of 3 days, as before, and bargain with Local 391 concerning absentee call-in requirements.

(g) On unconditional application to return, offer to any employee who participated in the strike commencing October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989. Further, make whole such employees, with interest, for any loss of earnings suffered by reason of the Respondents' refusal, if any, to reinstate them in the manner set forth in the remedy section of the judge's decision, as amended.

(h) On request, furnish the Unions a complete copy of the merger agree-

ment between Holly Farms Corporation and Tyson Foods, Inc.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at all their various facilities including those in Wilkesboro, Roaring River, and Monroe, North Carolina; Harrisonburg, Temperanceville, and Glen Allen, Virginia; and Carthage, Seguin, and Center, Texas, copies of the attached notice

marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

---

[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated, Washington, D.C. May 28, 1993.

James M. Stephens, Chairman

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER OVIATT, dissenting in part.

I agree with my colleagues' findings and conclusions except in the following significant respect.

Consistent with my concurrence and partial dissent in *Camsco Produce Co.*, 297 NLRB 905, 910 (1990), I find that the Respondents' live haul workers are agricultural laborers and are not covered by the Act.[46] I would thus dismiss all complaint allegations that allege violations with respect to live haul workers.

In *Camsco*, to determine whether farm workers were employees under the Act or "agricultural laborers" excluded by Congress from the coverage of the Act, I applied a rule of substantiality and regularity. That is, farm workers, to be employees under the Act, must regularly handle or process a substantial amount of farm products grown by other than their own employer. Otherwise, they are

[46] I did not participate in the Board's decision in response to the Union's request for review of the Regional Director's decision in Case 11-RC-5583.

agricultural laborers excluded from the coverage of the Act.

Here, the workers in issue catch chickens and deliver them to the Respondents' Wilkesboro processing plant. During 1989, apparently deemed by the parties to be a representative year, the Respondents processed approximately 96 million chickens at the Wilkesboro plant. The Respondents purchased only 575,000 of those chickens—i.e., less than 1 percent—from outside sources. Thus, of the chickens handled by the live haul workers, less than 1 percent were raised by employers other than the Respondents.

The Respondents surely process an insubstantial percentage of chickens from outside sources. Therefore, al-

though the Respondents' live haul employees may regularly handle the chickens of other employers, they do not catch and transport a substantial number of chickens from employers other than their own.[47] The Board should find that the Respondents' live haul employees are agricultural laborers.

Further, as in my view these workers are excluded from the coverage of the Act, there is no basis for finding that the Respondents violated the Act in regard to them.

---

[47] In *Camsco*, the employer grew, harvested, and packed mushrooms. It obtained about 4 percent of its mushrooms from other growers—it grew the rest itself. I concluded that the 4 percent obtained from other growers was an insubstantial amount. Thus, I concluded that the farm workers who sorted, graded and packed the employer's mushrooms were agricultural laborers excluded from the coverage of the Act.

Dated, Washington, D.C. May 28, 1993.

Clifford R. Oviatt, Jr., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the
United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively, on request, with Chauffeurs, Teamsters and Helpers Local

Unions Nos. 29, 71, 355, 391, 657, 592, and 988, affiliated with International Brotherhood of Teamsters, AFL-CIO, as the exclusive joint bargaining representative of our employees in the following appropriate bargaining unit concerning wages, hours, and other terms and conditions of employment:

> All driver employees and yardmen employed by us who regularly are dispatched for outhauls through our terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at our facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT threaten that the departments in which you are employed

will be closed should you choose the Unions, or any other labor organization, as your bargaining agent.

WE WILL NOT threaten that, whether or not you choose the Unions as your bargaining agent, we will take away your jobs by selling the trucks that you drive and by subcontracting your hauling work.

WE WILL NOT solicit grievances from you and promise, directly or by implication, to adjust them in order to induce you not to select the Unions as your bargaining agent.

WE WILL NOT inform you that it would be futile to join or support the Unions, or any other labor organization.

WE WILL NOT threaten you with unspecified reprisals for having sup-

ported the Unions, or any other labor organization.

WE WILL NOT advise you to stop supporting the Unions in favor of forming a committee to negotiate with our management with respect to wages, hours, and other terms and conditions of employment.

WE WILL NOT establish, maintain, and disparately enforce a rule which prohibits you from distributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT threaten you with arrest and WE WILL NOT cause you to be arrested for distributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT inform you that other employees have been arrested for dis-

tributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT threaten you with discharge should you distribute union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT establish, maintain, and enforce a rule which prohibits you from discussing your pay rates with other employees.

WE WILL NOT threaten to retaliate against you by assigning you less mileage, thereby lessening your earnings, because you selected the Unions as your bargaining agent.

WE WILL NOT coercively interrogate you concerning your union activities, sympathies, and desires.

WE WILL NOT threaten you with retaliation for wearing union hats.

WE WILL NOT threaten discharge should you choose the Unions as your collective-bargaining representative.

WE WILL NOT threaten that employees who were active for Local 391 will be discharged for their union activities should the employees not choose the Union as their bargaining agent.

WE WILL NOT threaten that our management will know how you voted in a scheduled representation election should you choose Local 391, or any other labor organization, to be your bargaining agent.

WE WILL NOT discourage membership in a labor organization by discharging you, issuing written warnings to you for engaging in union activities, or

discriminatorily granting you pay raises.

WE WILL NOT condition employment on the acceptance of unlawful unilaterally imposed terms and conditions of employment, thereby discharging employees.

WE WILL NOT refuse to bargain with the Unions about offering employment to unit employees under changed terms and conditions of employment as an effect of the integration decision.

WE WILL NOT refuse to bargain with the Unions by bypassing the Unions and negotiating directly with unit employees concerning wages, hours, and other terms and conditions of employment; unilaterally changing wages, hours, and terms and conditions of employment; withdrawing

recognition from the Unions; and failing and refusing to provide the Unions with a copy of the merger agreement.

WE WILL NOT unilaterally change the absentee policy for live haul employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Teamsters Local Unions Nos. 29, 71, 355, 391, 657, 592, and 988 as the exclusive collective-bargaining representative of our employees in the drivers and yardmen unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understand-

ing is reached, embody such understanding in a signed agreement.

WE WILL, on request, recognize and bargain with Local 391 as the exclusive collective-bargaining representative of our employees in the following appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All live haul employees (chicken catching crews) employed at our processing facilities located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at our facility located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL offer Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle, and Joseph Richardson, whom we have unlawfully discharged, and the 47 employees named below, whose employment was unlawfully conditioned, reinstatement to their former positions and, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered by reason of our conduct against them, less any net interim earnings, plus interest. The 47 employees entitled to this remedy are:

Earl Howell
Fred Royal

Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy

Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

WE WILL rescind the discriminatory written warnings previously given to our employees, James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome.

WE WILL remove from our files any reference to the above discharges, written disciplinary notices, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and WE WILL notify the affected employees in writing that this has been done, and that we will not use the evidence removed against them in any way.

WE WILL, on request, rescind the unilateral changes concerning rates

of pay, hours of work, road fees, job benefits, and other terms and conditions of employment made on and after September 22, 1989, affecting our employees in the drivers and yardmen unit, retroactively to September 22, 1989, or to when such changes became effective, except that employees need not be relocated, and WE WILL make our employees whole, with interest, for any losses sustained due to our unlawfully imposed changes in wage rates, road fees, benefit plans, and other terms and conditions of employment, since the effective dates of these unlawful changes.

WE WILL, on request, furnish the Unions, in timely fashion, a copy of the merger agreement between Tyson

Foods, Inc. and Holly Farms Corporation.

WE WILL, on request, rescind our unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, live haul employees must call us to report absences within 2 days instead of 3 days, as before, and WE WILL bargain with Local 391 concerning absentee call-in requirements.

WE WILL, on unconditional application to return, offer to any employee who participated in the strike that began on October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privi-

leges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989, and WE WILL make such employee whole, with interest, for any loss of earnings suffered by reason of our refusal, if any, to provide reinstatement.

HOLLY FARMS CORPORATION AND ITS SUCCESSOR, TYSON FOODS, INC.

(3) 95 No. 210

Supreme Court, U.S.
FILED
AUG 4 1995
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

**HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,**
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFERS, TEAMSTERS AND HELPERS, et al.,
Intervenors.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Volume Two - Appendix to Writ of Certiorari

Charles P. Roberts III*
**HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.**
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(910) 375-9739

** Counsel for Petitioners*

BEST AVAILABLE COPY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD - DIVISION OF JUDGES

HOLLY FARMS CORPORATION
AND ITS SUCCESSOR,
TYSON FOODS, INC.

and Cases 11-CA-13184
11-CA-13267
11-CA-13487

CHAUFFEURS, TEAMSTERS
AND HELPERS LOCAL UNIONS
NOS. 29, 71, 355, 391, 592,
567 and 988, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO

HOLLY FARMS CORPORATION AND
ITS SUCCESSOR, TYSON FOODS,
INC.

Employers

and Case 11-RC-5583

CHAUFFEURS, TEAMSTERS AND
HELPERS LOCAL UNION NO. 391,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO
HELPERS OF AMERICA, AFL-CIO

Petitioner

Jasper C. Brown, Jr., and Michael W. Jeannette, Esqs., of Winston-Salem, NC, for the General Counsel.
Jesse S. Hogg and James M. Blue, Esqs. (Hogg, Allen, Norton & Blue, P.A.), of Coral Gables and Tampa, FL, and William C. Warden, Jr., Esq. (McElwee, Cannon & Warden), of North Wilkesboro, NC for the Respondents.
J. David James and Bryan Lessley, Esq. (Smith, Patterson, Follin, Curtis, James Harkavy & Lawrence), of Greensboro, NC, for the Charging Parties.

DECISION

Statement of the Case

ROBERT M. SCHWARTZBART, Administrative Law Judge: These consolidated cases were heard in Wilkesboro and North Wilkesboro, North Carolina, upon complaints issued pursuant to charges filed jointly by Chauffeurs, Teamsters and Helpers Local Unions No. 29, 71, 355, 391, 592, 567 and 988, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

AFL-CIO, hereinafter collectively called the Unions, and separately by Teamsters Local Union No. 391, herein Local 391.[a] The consolidated com-

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[a] All dates hereinafter are within 1989 unless otherwise stated. The relevant docket entries are as follows: The original, amended and second amended charges in Case 11-CA-13267 were filed by Local 391 on April 5, 11 and 18, respectively. The charge, amended charge, second and third amended charges in Case 11-CA-13184 were jointly filed by the Unions on February 8, 16, October 2 and 11, respectively. The charge, amended charge and second amended charge in Case 11-CA-13487 were filed by Local 391 on August 25, 31 and October 12, respectively. The charge and amended charges in Case 11-CA-13520 were filed by the Unions on September 15 and October 24. The charge in Case 11-CA-13619 was filed by the Unions on November 28. The charges in Cases 11-CA-13267 and 11-CA-13619 were filed by Local 391. The charges and amended charges in the remaining aforesaid cases were filed jointly by Local Union Nos. 29, 71, 355, 391, 592, 657 and 988. The complaint in Case 11-CA-13627 and the order consolidating that matter with the consolidated complaint in Cases 11-CA-13184, 11-CA-13487, 11-CA-13520, were dated May 18 and October 13, respectively. The order consolidating the aforesaid cases with the hearing on objections and challenged ballots in Case 11-RC-5583 also issued on October 13. An amended consolidated complaint, issued November 8, and the amended complaint in Case 11-CA-13619, issued January 5, 1990, was consolidated into this proceeding at the hearing. The original complaint in Case 11-CA-13619 had issued on December 28. The (continued...)

plaints allege that Holly Farms Corporation, herein Holly Farms, violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, prior to the July 18 purchase of that Company by Tyson Foods, Inc., herein Tyson, and since that date, both Tyson and Holly Farms, herein collectively the Respondents, have acted in violation of Section 8 (a)(1), (3), and (5) of the Act. In this regard, the General Counsel alleges that Tyson, since the July takeover, has been Holly Farms' successor and has succeeded to the asserted predecessor's bargaining obli-

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*(...continued)
complaint in Case 11-CA-13669, issued February 5, 1990, and consolidated into this proceeding at the hearing, later was severed and dismissed upon the General Counsel's motion. The complaints were further amended at the hearing which was held during 25 days between November 27, 1989, and May 2, 1990.

gation with the Unions, as described below. The General Counsel argues that the Respondents should be required to bargain with respect to two bargaining units.

The first such unit, herein the drivers-yardmen unit, was Board-certified on March 24 and includes:

> All driver employees and yardmen at the Respondents' Wilkesboro, North Carolina, Glen Allen (Richmond), Harrisonburg and Temperanceville, Virginia; and Center and Sequin, Texas, facilities; excluding all office clerical employees, and guards and supervisors, as defined in the Act.

As indicated by the above description, the drivers-yardmen unit was widespread so that geographic jurisdiction over the various unit facilities was distributed among the vari-

ous Teamsters local unions herein as follows:

Local Union No.	Locations
29	Harrisburg, VA
355	Temperanceville, VA
592	Glen Allen (Richmond), VA
71	Monroe, VA
391	Wilkesboro, NC
657	Seguin, TX
988	Center (Houston), TX

The other unit, herein the live haul unit, where there has been no Board certification but where a bargaining order has been requested, was found appropriate by the Board in Case 11-RC-5583. This unit includes:[29]

> All of the Employers' live haul (chicken catching crews) employees at the Employers' facilities in Wilkesboro, North Carolina, and the Employers' feed haul, feed mill and service center employees at the Employers' facility in Roaring River, North Carolina; excluding all office employees, guards and supervisors as defined in the Act.

Pursuant to a petition filed by Local 391 in Case 11-RC-5583, a Supplemental Decision and Direction of Election issued by the Regional Director for Region 11 on June 20 and the Board's Decision on Review and Order, dated July 20, a representation election by secret ballot was conducted on July 27 in the above-described bargaining unit including live haul employees.[30] The tally of ballots served upon the parties imme-

[29] Unlike the above-described drivers-yardmen unit, where the seven Teamsters locals were jointly certified, only Local 391 has sought to represent live haul unit employees.

[30] While the petition in Case 11--RC--5583, when filed, then accurately named Holly Farms as the sole employer, Tyson was in control by the time of the July 27 election.

diately following the election showed that of the approximately 198 eligible voters, 187 cast ballots, of which 92 were cast for the Union, 95 were cast against the Union and 10 ballots were challenged. There were no void ballots, but the challenged ballots were sufficient in number to affect the results of the election. Local 391 filed timely objections to conduct affecting the results of the election. In their objections, the Union alleged that in the critical period before the election,[31] the Respondent-Employers, through their duly-authorized representatives, interrogated their employees concerning their union activities and desires; threatened their employees with retaliation because of their union activities; promised their employees benefits to discourage their support of the Union; threatened their employees with discharge if they voted for the Union and if the Union won

[31] In Goodyear Tire and Rubber Company, 138 NLRB 453, the Board defined the critical period before an election as the interval from the date of the filing of the petition to the time of the election. Conduct occurring during this period found to have interfered with the employees' freedom of choice at the polls may be grounds for setting aside the election. As will be discussed below, the Respondents challenge the interrupted application of this rule in the present case on the ground that certain allegations of the (continued...)

[31](...continued)
Respondents' unlawful conduct assertedly affecting the election results occurred during a hiatus period when the petition in Case 11--RC--5583 had been dismissed but had not yet been reinstated. The Respondents, because of this, contend that since no petition was pending when their disputed conduct was to have taken place, then the critical period before the election in this case should date from the reinstatement of the petition rather than from its initial filing, and that the disputed conduct should not be considered as affecting the election results. For reasons which will be detailed below, I find no merit to this argument and will find that, in Case 11--RC--5583, the critical period remained from February 16, when the petition originally was filed, to July 27, the election date.

the election; campaigned in the polling area while the polls were open; gave their employees a wage increase shortly before the election; ordered their employees to cease union handbilling on their premises during non-work time in non-work locations; and threatened the arrest of their employees who had engaged in union handbilling during non-work time in its non-work locations.

On October 13, the Acting Regional Director issued his Order directing that issues raised by the objections to the election and the determinative challenged ballots in Case 11-RC-5583 be resolved in consolidated hearing with Cases 11-CA-13184, 11-CA-13267, 11-CA-13487, 11-CA-13520 and the sub-

sequently consolidated Case 11-CA-13619.

Issues

1. Whether the Respondents by their managers, supervisors and/or other authorized agents, independently violated Section 8(a)(1) of the Act by:

(a) Threatening their drivers-yardmen unit employees that the Respondents' trucking operations would be discontinued and the employees' hauling work contracted to outside firms if they selected the Unions as their collective-bargaining representative.

(b) Threatening their employees that their jobs would be lost if they chose the Unions as their collective-bargaining representative.

(c) Threatening their employees that it would be futile for them to select the Unions as their collective-bargaining agent.

(d) Threatening their employees that the Respondents' trucking operations would be reduced if they failed to accept a collective-bargaining contract that incorporated only existing terms and conditions of employment.

(e) Promulgating, maintaining and enforcing a rule prohibiting their employees from discussing wages among themselves.

(f) Suggesting to employees that they form a committee to negotiate with management instead of selecting the Unions as their collective-bargaining representative.

(g) Threatening their employees with unspecified reprisals for engaging in union activities.

(h) Threatening their employees with retaliation if they selected the Unions as their collective bargaining representative.

(i) Soliciting and promising to resolve their employees' grievances if they rejected the Unions and/or Local 391 as their collective-bargaining representative.

(j) Informing their employees that the Respondents maintained and enforced a no-solicitation rule prohibiting solicitation of any kind at any location on their premises.

(k) Interrogating employees as to their union activities, sympathies and desires.

(l) Directing their employees to cease union handbilling in nonwork areas of the Respondents' premises during non-work hours.

(m) Threatening and causing the arrest of their employees for engaging in union handbilling in non-work areas of the Respondents' premises during non-work time.

(n) Threatening employees that the Respondents' management would know how they voted in a scheduled representation election if they voted in favor of the Local 391.

(o) Discriminatorily prohibiting the posting of union literature on their bulletin boards.

(p) Prohibiting their employees from wearing union hats or insignia.

(q) Engaging in surveillance of their employees' union activities.

(r) Threatening employees with discharge because of their union activities.

2. Whether the Respondents discriminated against employees in violation of Section 8(a)(3) of the Act by:

(a) Discharging and refusing to reinstate employees Alvin Bouchelle, Raymond K. Huffman, Jr., Patricia Barker and Joseph Richardson, because of their union activities.

(b) Issuing written disciplinary warnings to employees Harden Branscome, Teddy Ray Hayes, Gene Hester and James Phillip Church because of their union activities.

(c) Granting live haul unit employees pay increases shortly before a scheduled representation election to discourage union membership or support.

(d) Constructively discharging 47 long distance drivers, members of the drivers-yardmen unit, because of their support for the Unions.

3. Whether the Respondents refused to bargain in good faith with the Unions in violation of Section 8(a)(5) of the Act by:

(a) Constructively discharging the above-noted 47 drivers who had refused to continue to work for the Respondents under unilaterally changed wages, hours and other working conditions imposed by the Respon-

dents without prior bargaining with the Unions.

(b) Withdrawing recognition from the Unions as bargaining representative of the employees in the drivers and yardmen unit during the year Union's certification year.

(c) Bypassing the Unions and dealing directly with unit employees concerning wages, hours and other terms and conditions of employment.

(d) Refusing to furnish the Unions with a requested copy of the merger agreement between Tyson and Holly Farms, allegedly necessary to enable the Unions to meet their bargaining responsibilities.

(e) Unilaterally, without notice to or bargaining with the Union, changing the absenteeism call-in

policy for employees in the live haul unit.

(f) Unilaterally, without notice to or bargaining with the Union, informing live haul employees that their pension plan would be terminated in 1 1/2 years.

4. Whether, in the context of the Respondents' unlawful conduct, the strike among the Respondents' drivers in the drivers-yardmen unit that began on October 1 was an unfair labor practice strike.

5. Whether, in the context of the above violations, the Respondents should be required to bargain with Local 391 with respect to live haul unit employees based on that Union's majority status as evidenced by signed union authorization cards.

6. In the alternative to issuing a bargaining order with respect to the live haul unit, whether the representation election in Case 11-RC-5583 should be set aside and a new election directed. Subordinate issues involved include:

(a) Whether supervisor Commie Johnson interfered with the conduct of the election.

(b) Whether the determinative challenge to Tony L. Clark's ballot should be sustained.

All parties were given full opportunity to participate, to examine and cross-examine witnesses, o introduce relevant evidence and to file briefs.[52] Briefs filed by the Gener-

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[52] The General Counsel's post-hearing motion to correct their brief was unnecessary (continued...)

al Counsel, the Charging Parties and the Respondents have been carefully considered.

Upon the entire record of these consolidated cases and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent Holly Farms, a Delaware corporation with a facility in Wilkesboro, North Carolina, is engaged in poultry production and processing. During the 12 months prior to issuance of the consolidated complaints herein, representative periods, Respondent Holly Farms shipped from its Wilkesboro facility products

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[52](...continued)
as the brief was complete as originally submitted.

valued in excess of $50,000 directly to points outside the State of North Carolina.

Respondent Tyson, a corporation licensed to do business in the State of North Carolina, with a facility in Wilkesboro, North Carolina, is engaged in poultry production and processing. On about July 18, Tyson purchased a controlling interest in Respondent Holly Farms' stock and, since that date, has been engaged in the same business operations at the same location selling the same product to substantially the same customers and has as a majority of its employees, individuals who previously were employees of Holly Farms. Holly Farms Foods, Inc., and Holly Farms Food Services, Inc., are wholly-owned

subsidiaries of Holly Farms Corporation and Holly Farms Corporation is fully owned by Tyson.

The complaints allege, the answers, as amended at the hearing, admit, and I find, that Respondents Holly Farms and Tyson, respectively, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The Unions herein are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background: Factual Overview

The Respondent Holly Farms, before July, was independently engaged in producing, processing and shipping poultry and related products. While

Holly Farms' principal and headquarters facility was in Wilkesboro, North Carolina, it had facilities at other points in the United States including Monroe, North Carolina; Glen Allen, Temperanceville and Harrisonburg, Virginia; and in Center and Seguin, Texas. The North Carolina and Virginia facilities comprised the Holly Farms Eastern Division, while the Texas facilities constituted the Holly Farms Western Division. Holly Farms, either directly or through its subsidiaries, operated hatcheries, live haul operations, feed mills, feed haul operations, maintenance facilities, and poultry processing plants. Product was moved between facilities for further processing or to customers by drivers in

the Holly Farms Transportation Department,[53] in which the above drivers-yardmen unit was included. As of September 12, Holly Farms, within the drivers-yardmen unit, employed 209 drivers, including extra-board, replacement drivers who did not have regular vehicle assignments, to operate about 170 tractors. Of these, around 120 were used for long haul operations and the remainder for local traffic. At the time of the March 9, 10 and 11 election in the drivers-yardmen unit, 299 drivers and about 45 yardmen were employed. The great majority of these employees were in the eastern division.

[53] Holly Farms had plants and terminals at all of the aforesaid locations except Glen Allen (Richmond), Virginia, where it only had a terminal, and Harrisonburg, where there only was a plant.

The Respondents' Wilkesboro complex, where much, if not most of the relevant events occurred, was the nucleus of the Holly Farms operations before July 18 when Tyson assumed control. After Tyson took over, this complex continued to function for approximately the next 2 months under the same managers and supervisors and with the same employees in essentially unchanged fashion, except for certain changes in the transportation department, which will be detailed below.

The complex' north side was the location of the main processing plant where caged live chickens, brought in by live haul employees[54] on trucks

[54] As will be discussed in greater detail, live haul employees consisted of chick- (continued...)

from the grow-out farms, were weighed and ultimately moved into the processing plant, where fresh chicken products were prepared. This structure was bounded on the east, across a company street, by the food service plant, also known as Convenience Foods which, among other things, produced fast and frozen foods. A large employee parking lot lay to the west of the processing plant. This lot, in turn, was partially abutted on the south by the cooked products plant

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[54](...continued)
en catchers and live haul drivers, who worked as members of crews. The chicken catchers would be transported to grow-out farms, where the chickens were raised, and manually caught and caged the chickens. Live haul drivers drove the chicken catchers to and from the farms and used flat bed trucks to move the caged chickens from the farms to the Wilkesboro complex scales and main plant receiving dock. After delivering each load to the complex, the live haul drivers would return to the farm for additional loads until the completion of their shifts.

which, inter alia, prepared factory roasted chickens, sold as fully cooked. The scales, scales office, live haul office, broiler service and live haul truck parking areas occupied the central areas of the complex. The transportation service buildings and parking areas for transportation department drivers were at the south and southeast corner, respectively. The complex, which employed about 2,500 employees, also contained various plant cafeterias, a retail store and additional company streets and parking areas.

The seven local unions in this matter began their organizing campaign on December 1, 1988, among the Holly Farms drivers and yardmen in that Company's above-referenced North

Carolina, Virginia and Texas facilities. Following an election on March 9, 10 and 11, the Unions were jointly certified on March 24 as bargaining representative for employees in that unit in Case 11-RC-5571.

In late December 1988, Local 391 began its separate campaign to organize the Holly Farms live haul unit employees. On February 16, Local 391 filed the petition in Case 11-RC-5583 for a representation election among employees in a much larger unit than that ultimately approved by the Board. During this unit-sorting process, the Regional Director, on March 27, dismissed the petition in Case 11-RC-5583 on the ground that certain of the employees sought, including hatchery workers, were exempt

from coverage under the Act as agricultural employees and because Local 391 had not expressed a desire to represent only those non-agricultural employees who were covered by the Act. However, in response to the Union's April 6 request for review, wherein it asserted that it would be willing to proceed to an election in any unit or units the Board found appropriate, the Regional Director, by Order, dated April 28, treated the Request for Review as a Motion for Reconsideration, reopened Case 11-RC-5583 and noticed the matter for hearing to obtain further evidence concerning the appropriate unit. On July 20, the Board granted Local 391's subsequent request for review of the Regional Director's determina-

tion that an election should be ordered for employees in two bargaining units, and directed that an election be conducted for the employees in the single above-described unit. The Union did not receive a majority of the ballots cast at the July 27 election. After the election, the Acting Regional Director sustained the challenges to the ballots of 6 of the 10 determinative ballots and overruled the challenges to 3 other ballots. Ultimately, this resulted in a tie vote and it became necessary to resolve the remaining determinative challenge—that of Tony L. Clark. Local 391 also filed timely objections to conduct affecting the results of the election. As noted, the issues concerning Clark's determina-

tive challenged ballot and the election objections were consolidated herein.

Following the Union's March certification as representative for the Holly Farms drivers and yardmen, representatives of that Company and the Union participated in a series of negotiating sessions, starting in April, to try to reach agreement on a collective-bargaining agreement. Although it is agreed that these negotiations were conducted in good faith, by July, after about 12 sessions, the parties had not yet settled the terms of a contract. Also in July, as Tyson's takeover of Holly Farms became imminent, negotiations were suspended at Holly Farms' sug-

gestion, pending clarification of the general situation.

When, on August 8, 9 and 10, contract negotiations for the drivers-yardmen unit resumed, Holly Farms' Attorney Jesse S. Hogg continued as Company spokesman, but with Tyson in control and its representatives present. At that time, the Respondents informed the Unions that drivers in what had been the Texas-based Holly Farms western division would be consolidated into the larger Tyson transportation system,[55] but that existing eastern transportation division would remain, except that it would be reduced by the layoff of 71

[55] At the time, Tyson's transportation department was about twice the size of that of Holly Farms.

drivers and the removal of 47 tractors.

The parties met again in late August when the Respondents gave the Unions copies of the Tyson wage and benefits plans, announcing their intention to apply them to the drivers unit employees.

At the last bargaining session, on September 12, the Respondents announced that they were rescinding their previously-stated plans to lay off the 71 eastern division drivers and remove the 47 tractors. Instead of these reductions in personnel and equipment, the Respondent declared that they were going to also merge the eastern division, with the western division drivers into the Tyson transportation system; that the Re-

spondents were immediately going to send letters to all drivers offering them employment with Tyson under the Tyson pay package and work rules;[56] that Holly Farms' job benefits would be continued for eastern division employees for 2 years in accordance with the Tyson/Holly Farms merger agreement;[57] that recognition was being withdrawn from the Unions; and that Holly Farms was prepared to bargain only with respect to the impact of these decisions to integrate, but not the decisions, themselves. The

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[56] As will be discussed, the Tyson pay plan was less remunerative than was Holly Farms' and, under Tyson, drivers wold [sic] be required to spend more time away from home on longer runs.

[57] The Respondents refused to grant the Unions' request for a copy of the merger agreement.

Unions protested and refused to negotiate impact.

On September 12, immediately after the meeting with the Unions, the Respondents sent letters to all Holly Farms drivers on Holly Farms stationery offering them employment as Tyson drivers under the terms and conditions of employment applicable to Tyson drivers, advising that those who did not accept the offer by September 22 would be deemed to have resigned. In the meantime, between September 12 and 22, members of the Respondents' management and supervision met with eastern division drivers at various facilities to describe the new proffered employment arrangement and to answer questions. After September 22, the Respondents also

undertook the announced comprehensive integration of Holly Farms into the Tyson organization. This process essentially was completed before the time of the hearing and was described in detail in the record.

Of the more than 200 Holly Farms drivers who received the Respondents' September 12 letters offering employment under Tyson's terms, 47 drivers elected not to accept and were deemed to have quit. On October 1, the drivers began a strike against the Respondents.

The General Counsel and the Unions contend that the 47 drivers who refused to work for Tyson on and after the September 22 deadline under the unilaterally changed employment terms offered were constructively dis-

charged in violation of Section 8(a)(1), (3) and (5) of the Act.

The parties have raised many issues and defenses in connection with this proceeding which will be topically addressed herein. Although not included in the foregoing factual outline, the General Counsel and Unions contend that before Tyson assumed control on July 18, Holly Farms had independently engaged in numerous violations of Sections 8(a)(1) of the Act affecting drivers-yardmen and live haul unit employees, respectively, and also had violated Section 8(a)(3) by conduct which allegedly included the discharge of four plant employees and the issuance of written warnings to employees who had been active on the Unions' behalf. After

Tyson's July 18 takeover, the Respondents, jointly and severally, are charged with further violations of Section 8(a)(1), (3) and (5) of the Act.[58] The foregoing factual outline, intended as an overview, does not refer to all alleged violations of the Act.

Accordingly, the General Counsel argues that the strike that began on October 1 among the Respondents' long distance drivers was an unfair labor practice strike caused by the Respondents' unlawful conduct. The General Counsel and Unions also assert that a bargaining order should issue requiring the Respondents to bargain with

[58] The General Counsel argues that Tyson, as successor, was responsible under the circumstances applicable here to remedy Holly Farms' alleged unfair labor practices.

Local 391 with respect to the live haul unit on the ground that the Respondents' unlawful conduct had caused that Union to lose the majority it once had had held, as evidenced by union authorization cards, and as such conduct had rendered unlikely a fair, free election in that unit.

As stated, the Respondents' positions and defenses will be considered under relevant topics.

B. Supervisory Issues

1. General conclusions

The complaints herein allege that, before Tyson's July 18 takeover, 30 individuals were Holly Farms supervisors and agents. The same 30 also were alleged as the Respondents' supervisors and agents after July 18, except that 3 new names were added—

those of Tyson's board chairman and chief executive officer, Don Tyson; and that Company's president and vice-president, industrial relations, respectively, Leland Tollett and Howard Baird.

The Respondents have variously amended their answers to admit that, with the exception of John Sloop,[59] all persons respectively alleged to be Holly Farms and Tyson's supervisors and agents exercised the authority and functions of supervisors and

[59] While denying that Sloop was a supervisor before September 25, when his alleged unlawful activities were to have occurred, the Respondents admit that, since that date, Sloop has been their supervisor and agent within the meaning of the Act. Sloop's pre-September 25 status will be considered below.

agents within the meaning of the Act.[60]

In accordance with the parties agreement, I find that the following individuals, who did not regularly or directly oversee live haul employees, were, at all material times, the Respondents' supervisors and agents, within the meaning of Section 2(11) and (13), respectively, of the Act: Blake Lovette, Curtis (Bob) Absher, David Hayes, David Fairchild, A. Gerald Lankford, Barbara Mathis, Marion McKinley (Al) Bare, Mary Barnes, Robert Pipes, Ronald Bell, David Eller, Jerry Blevins, Shelton Goddard, Gary Hamby, Murl Murphy,

[60] In agreeing to supervisory authority, the Respondents do not admit the accuracy of the respective job titles as alleged in the complaint. These will be provided as applicable.

Luke Roten, Raymond Strong, Harold Eller,[61] Ted Roten, Tommy Felts and Larry Church. Since Tyson's July 18 takeover, Don Tyson, Leland Tollett and Howard Baird also have been the Respondents' supervisors and agents within the meaning of the Act.

The Respondents, as noted, have maintained their position that live haul employees are not employees within the meaning of Section 2(3) of the Act because exempt as agricultural workers and that, therefor, supervisors over live haul employees, correspondingly, are not supervisors under the Act, although exercising the requisite authority, because they do

[61] Although a substantial number of persons referred to in this proceeding share like surnames, family relationships are not germane.

not supervise statutory employees. However, I am bound by the Board's decision in Case 11-RC-5583 that the live haul employees, in fact, are employees within the meaning of Section 2(3) of the Act. I, therefor, find that the following Respondents' live haul supervisors whom, the parties agree, otherwise have met the supervisory criteria of Section 2(11) of the Act, were the Respondents' supervisors and agents during the times relative to this proceeding: Ray Lovette, Commie Johnson, Dean Grimes, Donnie Jones, David Minton and Sam Whittington.

The Respondents deny that Charles Robert (Bob) Sebastian, manager of the Respondents' Wilkes Hatcheries, is a supervisor while admitting that

this authority would meet the criteria of Section 2(11) of the Act. Sebastian's status, which will be considered below in connection with the discussion of his alleged conduct, differs from that of the live haul supervisors, above, because unlike them, the Board, in Case 11-RC-5583, found that the hatchery workers who report to Sebastian were exempt as agricultural and excluded them from the unit.

Finally, in this regard, it will be necessary to determine whether, as the Respondents assert, Joseph Richardson, group leader of the receiving dock employees at the Holly Farms food service plant in Wilkesboro, was a supervisor and agent within the meaning of the Act. The parties

agree that Holly Farms had terminated Richardson for union activities before Tyson's arrival, and the principal issue concerning his termination is whether or not he was a statutory employee entitled to the protection of the Act when discharged.

2. The supervisory status of John Sloop

The parties have vigorously litigated John Sloop's alleged supervisory status as the complaint alleges that Sloop repeatedly engaged in conduct violative of the Act. The General Counsel and Unions, contrary to the Respondents, assert that, prior to June 25, while Sloop still was Holly Farms' driver-coordinator at its eastern transportation division, Wilkesboro, when his asserted unlawful conduct was to have occurred, he

was a supervisor within the meaning of the Act. The parties have stipulated that, after June 25, when promoted to Tyson's manager of safety and personnel, Wilkesboro, he became a statutory supervisor. Sloop had become driver-coordinator in 1979, having worked for Holly Farms as a long distance driver since 1962.

As driver-coordinator, Sloop participated in the driver hiring process, did pallet control, handled fuel accounts, prepared routing books to be followed by Holly Farms' drivers in making deliveries and performed other jobs. However, he did not dispatch drivers, handle their paperwork or, in the first instance, normally receive calls from drivers experiencing difficulties while on the road.

Such calls were made to the dispatcher.

Sloop testified that under hiring procedures adopted in 1987,[62] a committee scoring process was established to evaluate driver applicants. Under this method, David Hayes, Holly Farms' vice-president, transportation, would inform Sloop when it was necessary to hire a certain number of drivers and direct him to "pull" filed applications. Sloop usually took three times as many applications from the Company's files as there were vacancies to be filled and, after initially screening the applica-

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[62] Sloop was included in group of Company supervisors to receive a May 27, 1986, memorandum from David Hayes, vice-president, Holly Farms transportation division, requesting review of the proposed revisions to the driver application policy.

tions to remove candidates with bad driving records or who otherwise appeared unsuitable, Sloop would give them to Hayes for further review. A committee consisting of Hayes; Wilkesboro safety director David Granger; outhaul manager Barry Wood;[63] head dispatcher, Wilkesboro, Curtis (Bob) Absher[64] and Sloop, then rated the individual applicants. In doing so, the committee members afforded each candidate weighted points for a series of factors including, but not limited to, over-the-road driving experience, refrigerated trailer experience, safety traffic

[63] The outhaul manager booked outside carriers to make outhaul deliveries of Holly Farms products from Wilkesboro in place of Company-owned trucks.

[64] Absher was the immediate supervisor of drivers based in Wilkesboro.

violations, education, previous employment and attendance, personality and appearance. The committee voted a score for each which was recorded by Hayes. The applicants with the highest scores were selected in descending order for the available vacancies. With tie votes, Hayes decided who would be hired. Sloop participated as a full member of this committee, all of whose other members were managerial personnel and/or supervisors within the meaning of the Act, and his vote counted equally with those of the others.[65]

After the committee had evaluated various job applicants, it was

[65] After September 25, when Sloop became safety and personnel manager for Tyson, he personally took over what, under Holly Farms, had been the work of the entire hiring committee.

Sloop's function to call in those who had scored the highest and steer them through further processing. He would send the potentially successful applicants to the first aid department for initial physical examination by the Company nurse and then would give them road tests.[6] Sloop had the test forms typed indicating that the road tests had been given and his signature certified that applicants had passed. In grading road tests, driver-applicants either passed or failed. Sloop's road test evaluations did not recommend whether the applicants be hired and, in 10 years, only two applicants had failed to

[6] Only Sloop administered road tests, during which respective applicants, with Sloop as passenger, would drive 25 miles performing various truck maneuvers characteristic of a daily run.

pass. Nonetheless, no driver could be hired without having been successful on the road test.

After the road test, Sloop would send driver applicants for final physical examination by the Company physician and then to the safety director to be given U.S. Department of Transportation (DOT) tests and Company orientation. When the driver-hopefuls returned from the safety department, Sloop would send them to vice-president Hayes for interview. It was Hayes who told the successful candidates that they were hired. Sloop then would issue to the new drivers route directories, prepared by himself; a cargo lock; a credit card and a list of telephone numbers, before turning them over to the dis-

patchers. This ended Sloop's role in the hiring process.

Sloop attended managerial meetings on an average of every 2 or 3 months when invited because an area of his responsibility, such as pallet control or routing, was to be discussed.

From February until the July Tyson takeover, Sloop also was engaged in pallet control, which principally consisted of tracking the low wooden platforms on which loads were placed and on which all of Holly Farms' products were moved. Sloop would try to retrieve pallets that drivers did not bring back from deliveries. This required returning the receipts for the pallets to the customers who had issued them—done by mail or by sending the receipts with drivers.

Sloop, however, did not directly send drivers to pick up Company-owned pallets but would give the receipts to the dispatchers requesting that they to have the drivers do so.[67] It was not mandatory that drivers return pallets and, to Sloop's knowledge, no driver ever was disciplined for losing pallets or charged for a pallet shortage. Sloop never took action against any driver who failed to obtain pallets owed to Holly Farms.

Sloop's files relating to pallets, fuel accounts and drivers' road violations were stored in his 8 by 11 foot office furnished with a desk,

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[67] Sloop culled the pallet receipts from shipping tickets and filed the information as to where the pallets had been left -- in effect keeping records of which companies owed Holly Farms pallets, and vice versa.

filing cabinet, telephone and calculator. He did not have a secretary.

With regard to fuel control, Sloop, based upon his prior 17 years experience as a Company driver, but principally upon information obtained from questioning drivers, prepared a list of fuel stops for the drivers, revising this list during each year. Sloop also gave drivers a credit card widely-accepted in the trucking industry to be used for fuel purchases.

Drivers testified at the hearing that they had been required to use routes specified in a route book prepared and given to them by Sloop and that they were authorized to deviate from the selected route only in extreme situations, such as very bad weather. Driver Barry Gordon Foster

testified that Sloop also specified the routes to be used for backhaul. Drivers were paid on basis of the mileage available from the routes Sloop designated. A driver, whose name Foster could not recall, had been dismissed because he became involved in an accident while off the designated route. Driver Howard C. Eller testified that about 2 years before, he had found it necessary to speak to Sloop to obtain permission to change a designated routing which Eller considered to be extremely dangerous. Sloop, in turn, had consulted transportation vice-president Odell Whittington,[66] before responding. Eller was not certain whether

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[66] Odell Whittington preceded David Hayes as Holly Farms vice-president for transportation.

it was Whittington or Sloop who later authorized the suggested route change.

Sloop testified that there were routing directories—the Holly Pack Route Book for fresh chicken deliveries—and the Holly Farms Fried Chicken Directory. These books contained driver information compiled by him, indicating customers' names, addresses and directions to the customer locations. The Fried Chicken Directory listed approximately 600 customers and specific travel directions. As the shelf life of fried chicken is longer than that for fresh chicken, the fried chicken route book provided for multistop loads. There were not as many stops in the Holly Pack Directory, but both books established routes to be taken by direct drivers.

Sloop prepared the first such directory—for fresh chicken deliveries—in 1981, about 2 years after becoming driver-coordinator, at the direction of Vernon Church, then Holly Farms vice-president, transportation. Church worked with Sloop on the document and, when completed, Church approved its use. Sloop next assembled the separate fried chicken directory in 1984. Both route books were revised after six to eight new customers were obtained. To route drivers on interim bases during periods when less than six to eight new customers had been aggregated, Sloop would post handwritten directions on the drivers' bulletin board. Sloop

determined the routes to be used in consultation with the drivers who might suggest ways of traveling to new customers.

Responding to driver Foster's above testimony that a driver had been terminated for deviating from the prescribed route, Sloop related that, in 1983, a driver named Myers had had an accident while not following the directory routing and that Myers had been terminated because of the accident.

While the directories still were given to new drivers since Tyson assumed control of Holly Farms, the route books now serve merely as guidelines because Tyson has its own routing system in the form of computer printouts.

Sloop denied that, as driver-coordinator, he had authority to assign work, to transfer or promote employees, to grant pay increases, or to effectively recommend any of the above. He also denied having had any formal role in the adjustment of grievances. Informally, however, as his office had been in direct line from the drivers' parking lot to the transportation office, drivers stopped by to talk to him about their problems, and Sloop did tell drivers that he would mention their concerns to management officials. Beyond that, Sloop denied having any role in solving or answering drivers' complaints.

The evidence conflicts as to whether Sloop played a role in disci-

plining drivers. Donald Kanupp testified that, on June 1 while still a Holly Farms driver, he received a written logging violation for violation of the 70 hour rule, a U.S. Department of Transportation (DOT) time limit on truck operation, notifying him that such a discrepancy had been detected in the preparation of Kanupp's daily logs for May. The form directed Kanupp to report to Sloop as soon as possible and was signed by Sloop as "Company Official." Kanupp, however, testified that he had received the logging violation form on about June 1 from Sloop while they were alone. Sloop asked the reason for the violation on Kanupp's log—he was about 15 minutes over the permitted 70 hours. Kanupp

replied that the only thing he could figure was that he had just miscounted. Sloop entered Kanupp's explanation on the bottom half of the form and both men signed it. Sloop told Kanupp that this write-up for a logging violation would go in his file.

John E. Danner testified that in August 1986, he had attempted several times to deliver frozen products to a destination in Cincinnati, Ohio. However, the receiving agent repeatedly refused to accept the load. When Danner returned to that dock after having been reassured by the Holly Farms dispatcher that the matter would be straightened out, the receiver, accusing him of attempting to go over his head, again refused the load and asked Danner to leave

the premises. After Danner made a second call to the appropriate Holly Farms staff and a resultant third delivery attempt, the receiver called the Wilkesboro dispatch number and Sloop ordered Danner back. When Danner returned, Sloop told him that if that happened again, he would put a reprimand letter in Danner's file. Danner did not know whether a disciplinary note was placed in his file.

Gene Hester testified that in mid-August, he was present in Sloop's office when Sloop attempted to discipline driver John Thompson. According to Hester, Sloop had prepared a written warning, telling Thompson that he erred in completing his logs. Thompson replied that he did not want to change his logs as he felt that he

had prepared them correctly. Hester related that Sloop ultimately agreed that Thompson was correct and discarded the written warning, but told Thompson that the record of their conversation stood.

Finally, driver Robert Gwyn Wyatt testified that on March 3, in snow and ice, he had had an accident near Toledo, Ohio, in which his truck slid into a guard rail. Only Wyatt's vehicle was involved, the damage assertedly had not been serious and Wyatt had duly called his office to report the incident at the earliest opportunity.

According to Wyatt, about 4 or 5 days later, Sloop came into the drivers' room where several other drivers, including Wyatt, were talking.

Sloop told Wyatt that he should have been fired 100 times since he had been with Holly Farms. When Wyatt asked why, Sloop told him because of his driving record; the guard rail in Toledo had not flown up and hit him, had it? Wyatt answered no, but that that had been a weather-related incident and that he never had been charged with a weather-related accident. Sloop replied that a chargeable accident is anything the Company wants it to be. When the other drivers began to criticize Sloop, Sloop left the room.

Sloop explained that drivers were required to keep logs of all their activities while on the road—indicating their sleep time, driving time, off-duty time, etc., which in-

formation was noted by the log clerks when the logs are turned in together with the drivers' other paperwork. Sloop explained that records of logging violations were kept by the Respondents because of DOT regulations; DOT audited the Respondents' daily drivers logs and trip reports. Sloop testified that his only function in that area had been to make up and file logging violation forms. Sloop, not involved with DOT Audits, did not know whether DOT ever had asked to see violation forms. Sloop, however, admitted that DOT fined companies, and even drivers, for such violations.

When a logging violation, such as that recorded for Kanupp,[69] was called to Sloop's attention by the logging clerks, he would enter the violation on the appropriate form; discuss with the driver his reasons for the violation, noting the reasons on the form; and file the form, with a copy going to the employee's personnel file. Sloop testified that while he had responsibility for compiling logging violations, they had not constituted grounds for discipline. Only six such violation forms have been used.

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[69] Sloop essentially agreed with Kanupp's account of what had occurred when Kanupp was given his logging violation notice. However, Sloop maintained that he did not recommend further action against Kanupp because of this infraction. Sloop related that he had spoken to Kanupp at vice-president Hayes' request and had told Kanupp that the incident was no major violation but would be written up as a matter of record.

With respect to Hester's testimony concerning driver John Thompson, Sloop recalled that in August, Thompson, en route to his car parked just outside Sloop's office door, complained to Sloop that he was angry about not being dispatched fairly in that he was not getting as many trips as he felt entitled. Sloop, in turn, told Thompson that he had violated the 70 hour rule and asked him to sign the violation form. Thompson, repeating complaints about his lack of assignments, refused to sign anything. Sloop later reported Thompson's refusal to sign the violation form to Hayes who told him to write it up and to put it in Thompson's file without the latter's signature, which Sloop did.

As to the Wyatt incident, Sloop related that, in February, after the union campaign had started, he was passing through the drivers' room where several drivers, including Wyatt, were seated. All were praising the Union. Wyatt, who had had several accidents in the past, had just had another. After hearing Wyatt speak well about the Union, Sloop asked Wyatt how many times could the Company have fired him under a union contract. Wyatt answered maybe once or twice. Sloop retorted what did he mean once or twice? "We could have fired you a couple of weeks ago when you had that wreck on the ice." When Wyatt said that that was not chargeable, Sloop asked what Wyatt meant that it was not chargeable. How fast

had that guard rail been running when it hit him. Sloop described the exchange as just one big joke, relating that everyone laughed, that Sloop went on his way and that nothing more was said about the matter by himself or Wyatt.

Earlier, Sloop, on November 27, 1984, and October 5, 1988, respectively, had issued directive memoranda to "All Drivers" in his own name, without job title, outlining procedures to be followed by the drivers in certain situations. In the 1988 memorandum, Sloop noted that Holly Farms had made agreements with certain outside concerns to perform unloading services of products from two specified sources for delivery at two locations in Salem Virginia, at a

maximum charge for such loads of $75 regardless of load size. In this memorandum, drivers were instructed as to where to call for applicable unloading and who to call when running late. The 1984 memorandum detailed procedures drivers were to use when picking up pallets.

When, on September 12, the Respondents wrote to the drivers offering them jobs with Tyson, Sloop was referred to in the letters as to the party to whom to respond by the September 22 deadline.[70]

Sloop testified that, in 1986, at the request of outhaul manager Barry Wood, he accompanied Wood and chief dispatcher Bob Absher to the home of

[70] As noted, Sloop did not attain uncontested supervisory status until his September 25 promotion.

a driver for the purpose of terminating that employee for a specified infraction. Sloop related that his role was passive during that visit. While the driver was discharged on that occasion, Sloop merely had been present.

Sloop was salaried, as were members of management, including all who served with him on the hiring evaluation committee, while drivers basically were paid on the basis of their mileage. Sloop testified that management benefits were basically the same as those paid to drivers—company-paid long term disability and medical coverage,[71] life insurance and a noncontributory retirement

[71] Employees received medical coverage from the Company but paid to have such insurance extended to their spouses and families.

plan. When Sloop had become salaried in 1979, those benefits and his earnings were unchanged except that he received an extra $10,000 in life insurance coverage.

In 1989, prior to the arrival of Tyson, Sloop was not obliged to wear a uniform, but occasionally wore a coat and tie.

While Sloop, as driver-coordinator, lacked many of the supervisory indicia set forth in the disjunctively-construed Section 2(11) of the Act in that he could not, in Holly Farms' interest, independently discharge, transfer, suspend, lay off, recall, promote or reward employees, adjust their grievances, or effectively recommend such actions, I nonetheless find that while he held

that position he was a supervisor within the meaning of the aforesaid section of the Act.

A clear indicia of Sloop's supervisory status was his role as a full participant in the work of the committee that evaluated and effectively recommended driver-applicants for employment. There, Sloop cast votes equal to those by senior management and supervision. Except for Sloop, the supervisory status of all members of this standing committee was conceded, and on the basis of these votes, drivers were selected for hire. While Sloop's vote was only one of several cast concerning each applicant and while no one was hired in this process because of Sloop's vote alone, his votes in this setting

were counted as much as any of the involved supervisory personnel and his evaluations constituted structured, effective recommendations as to who should be hired. While Sloop's attendance at other types of management meetings were more irregular, based on whether any of his areas of responsibility were to be considered, the record reveals that Sloop's attendance at managerial meetings were not limited merely to those related to hire.

Sloop, however, had even greater involvement in the overall hiring process than did other members of the evaluation committee. When Hayes would begin the process by asking Sloop to "pull" driver applications, Sloop determined which of the many on

file would be selected for processing at that time. There was no requirement that this initial selection be random and the record shows that Sloop, in fact, did the initial screening before giving the applications to Hayes. After driver-applicants were graded by the evaluation committee, Sloop, more than others, participated in the further processing of high-scoring applicants, shepherding them to physical examinations and interviews and in administering, evaluating and certifying the prerequisite road tests. While Sloop's role in Holly Farms multi-faceted hiring procedures was subordinate to that of Hayes, no one else was more actively or responsibly engaged.

In addition to his ability to recommend the hire of employees as part of a supervisory panel, Sloop was afforded other indicia of special status. Unlike drivers, he was salaried; enjoyed job benefits somewhat superior to the drivers; had his own office; as Holly Farms representative, signed logging violations for which drivers could be subjected to DOT-imposed fines; prepared and distributed routing books which drivers were obliged to follow and which established fixed mileages to destinations on the basis of which the drivers were paid; orally and publicly reprimanded an employee for his driving accident record and, at the Company's request, accompanied supervisors to the home of an errant employ-

ee to witness that employees' discharge. After Tyson assumed control and while Sloop still was driver-coordinator, Holly Farms' drivers were directed in writing to notify Sloop by a date certain whether they would accept employment with Tyson under changed terms.

From the foregoing, I find that Sloop, when driver-coordinator, was a supervisor and agent within the meaning of Section 2(11) and (13), respectively, of the Act, as he could effectively recommend hire. I, in any event, find that the Respondents had cloaked Sloop, while driver-coordinator, with sufficient apparent authority for him to have been reasonably regarded by employees as an

agent of management for purposes of the unfair labor practices herein.[72]

C. Events Occurring Before Tyson's July 18 Takeover

1. The alleged Section 8(a)(1) violations affecting the drivers-yardmen unit—facts and conclusions

(a) By John Sloop

John C. Danner[73] testified that on January 21, he went to driver-coordinator John Sloop's office to report an accident. After making his report, Sloop asked how he felt about the Union. Danner told Sloop that,

[72] G.T.A. Enterprises, Inc., d/b/a "Restaurant Horikowa," 260 NLRB 197, 203; J.P. Stevens and Company, Inc., 243 NLRB 996, 1000-1001.

[73] Danner was employed by Holly Farms as a long distance truckdriver for about 3 1/2 years before testifying at the hearing. He continued to work in that capacity for Tyson.

as he knew,[74] Danner supported the Unions. Sloop declared that he guessed that Danner knew that if the Unions came in, Holly Farms president Blake Lovette would sell all the trucks, do away with the transportation division and that everyone there would be terminated.

Sloop's recollection of the incident was poor. He remembered that in January, Danner, an outspoken union supporter, had come to his office on his own initiative and had spoken to Sloop about the Unions, what they were going to do for the drivers; and, in non-specific terms, what they were going to do for Sloop. Danner

[74] The Unions earlier had named Danner in a letter to the Company listing the names of the employees who were members of its in-plant organizing committee. Sloop had seen this correspondence.

had referred to the number of drivers who were going to vote for the Union in the coming representation election and suggested that Sloop, too, might want to cast his ballot for the Unions. Sloop initially could not recall anything have been said either by Danner, or by himself, about reducing the size of the Company's tractor fleet, but then denied that, at any time before the election, he had stated to employees that the Company would sell off its tractors or that jobs would be lost.

I credit Danner's account of this conversation. His recollection of the specific conversation was clear, he was a more forthright than was Sloop and, as will be discussed, Sloop's conduct, as described by Danner, was consistent with an extensive pattern of Company threats. However, Sloop's interrogation of Danner as to how he felt about the Unions was not violative of the Act since Danner was a known union supporter.[75] I find that the Respondents violated Section 8(a)(1) of the Act both by threatening that if the employees selected the Union in the coming representation election, the Company would sell off its trucks,[76] and the transportation division employees all would lose their jobs.[77]

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[75] Rossmore House, 269 NLRB 1166, enfd. 706 F.2d 1006 (C.A. 9, 1985).

[76] Hood Industries, Inc., et al., 248 NLRB 597, 600, supplemented 273 NLRB 1587.

[77] Harrison Steel Castings Company, 293 NLRB 1158, 1168-1169.

Transportation department driver Harden Branscome testified concerning two conversations with Sloop in the period before and during the drivers' election, held on March 9, 10 and 11. In February, about 2 weeks before the voting, Sloop called Branscome and some other drivers into his office and told them that if the Company won the election, the Company, within 6 months, would get rid of all of the trucks and the drivers would lose their jobs. There was no response to this.

According to Branscome, on March 10, one of the days when the election was conduced, he encountered Sloop who invited him to his office. There, Sloop told Branscome that the Company was going to win the elec-

tion; that after the Teamsters went back to Kernersville,[78] the Company was going to start solving some of the employees' problems. Branscome conceded that it would be fair to call his March 10 conversation with Sloop a "debate" in that Branscome, a known union supporter, had discussed the Unions with Sloop on several occasions.

Gene Hester, a long distance Holly Farms driver, testified that in late February, he had stopped by Sloop's office to chat. While there, Hester complained about the excessive waiting time experienced at destina-

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[78] Local 391 is based in Kernersville, North Carolina.

tions.[79] Hester also told Sloop that the Unions were going to win the election. This statement by Hester about the Unions' election prospects was part of an ongoing, friendly and frequent discussion between the two men and Sloop then was well aware of Hester's pro-union stance. Sloop, however, told Hester that there was no way the Unions were going to win the upcoming election and, if the Unions did win, they all would be out of jobs—"All of us would be out of a job." Also during that conversation, Sloop told Hester that if the employees would send the "S.O.B.'s" back to

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[79] Drivers' waiting fees, compensation for time spent at customers' facilities waiting for unloading and for backhaul loads, were substantially reduced in December 1988. Drivers, at that time, had been expected to contact Sloop with questions concerning waiting time.

Kernersville and air their grievances with (Holly Farms president) Blake Lovette, they could work it out themselves. Sloop concluded that if they did not do this, they all were going to wind up without jobs.

Sloop's response to the above-described testimony of Branscome and Hester essentially was to make the same generalized denials that he had entered with respect to Danner—that he had known at the time of the conversations that Branscome and Hester both were avid union supporters but that he had not made any statements threatening the loss of jobs if the employees selected the Union. Sloop did not refer to any particular conversation with either drivers.

In evaluating the respective testimony, I credit the more specific detailed accounts of Branscome and Hester as to what Sloop told them on the occasions in question. While the record, as it will be developed, shows that Hester and Branscome were closely associated in certain aspects of their union activities and had ample opportunity to put together similar stories concerning Sloop, the record also will establish that considerable unlawful conduct was directed against both men by other Company supervisors, increasing the prospective accuracy of their more precise accounts of what took place on the described occasions. Also, the cordial relationship between Hester and Sloop lessened the likelihood

that Hester would portray Sloop in undeservedly negative terms.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by Sloop's conduct in telling Branscome that if the Company won the election, all the employees would lose their jobs; by Sloop's statement to Hester that if the employees won the election, the employees all would lose their jobs; and by promising Branscome and Hester that if employees, in effect, got rid of the Union, the Company would resolve the employees' grievances.[80]

The General Counsel again referred to the incident, more fully described above in connection with the discus-

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[80] NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 107 LRRM 3332, 3334 (C.A. 6, 1981).

sion of Sloop's supervisory authority, where, shortly after driver Robert Gwyn Wyatt's March 3 accident in slippery weather, Sloop had criticized him before a group of other drivers in the drivers' room, as a threat of unspecified retaliation in violation of Section 8(a)(1) of the Act. Sloop, referring to the accident, had told Wyatt on that occasion that he should have been fired 100 times since he had been with the Company because of his driving record and that the accident, although occurring in icy conditions, could be chargeable, although, as Wyatt had protested, accidents that took place in such conditions usually were not. Sloop related that he had so spoken

to Wyatt after hearing him and the others praise the Union.

Wyatt further testified that earlier, in late February, Sloop beckoned to him as he was walking across the parking lot. Sloop was on the lot with since-retired driver Claude Whittington. When Wyatt walked over, Sloop asked why don't we form a committee and do away with and forget about the Union? We will form a committee and sit down and talk about our problems. Forget about the Union. Wyatt replied that he did not like the idea of a committee because anything the committee might agree to would not be binding on the Company. Sloop told Wyatt that if the Union is voted in, in 6 months we'll all be gone. Wyatt responded, "Well John,

I'll tell you. If you've done your job, you ain't got no problem. If you ain't done your job, you shouldn't have your job anyway." Sloop told Wyatt that he could retire; he was better off than and would not be affected like some of the rest.

Sloop remembered the parking lot incident involving Wyatt as having taken place in late February or early March as he and Claude Whittington were agreeing that they did not need a union and that what they should do is form a committee through which they could discuss their problems. When Wyatt joined them, they suggested to him that the drivers should form a driver-management committee. Wyatt had told them that if they did

not get a union in there, none of them would have a job. Sloop replied that he did not want to do that. Sloop denied that there had been any argument between himself and Wyatt on that occasion or that he had said words to the effect that, if the Union came in, employees would lose their jobs; that he had referred to a period of 6 months; or that Wyatt had told him that Sloop would not have to worry about his continuing to have employment if he did a good job. Whittington did not testify.

Again, I would credit Wyatt's account of his conversations with Sloop. From Sloop's own testimony, it can be found that he had criticized Wyatt in the drivers' room because Wyatt, at the time, had joined

in verbally supporting the Unions. Wyatt's testimony that Sloop, during their parking lot conversation, had told him, among other things, to forget the Unions and join in forming an employees' committee to negotiate with management, does not differ greatly from Hester's above account of Sloop having advised him that if the employees abandoned support for the Unions and the Company would resolve all their grievances. Such statement was a Company promise to resolve the employees' grievances if they would stop supporting the Unions. Wyatt's description also is consistent with what Sloop, as found here, told a number of drivers—that if they selected the Union, their jobs would be lost.

From the foregoing, I find that the Respondents violated Section 8 (a)(1) of the Act by Sloop's conduct in threatening Wyatt with unspecified reprisals, in the context of Wyatt's pro-union discussion with the drivers, by telling Wyatt that he could have been fired 100 times because of his driving record; by having told Wyatt in the parking lot that if the Unions were voted in, the employees would lose their jobs;[81] and by telling Wyatt, in Whittington's presence, to forget the Unions and join in forming a committee to negotiate with management over working conditions.[82]

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[81] Jay Foods, Inc., 228 NLRB 423, 430.

[82] American Display Manufacturing Co., Inc., 259 NLRB 21, 32.

Long distance driver Barry G. Foster testified without contradiction that in early April, after the Unions were certified as bargaining representative for the drivers-yardmen unit, Sloop told Foster in the drivers' room that the Company wanted to sign a contract with the Unions. Foster replied that that was fine; it was what the drivers wanted. Sloop, however, went on to say that the way the Company was willing to do this would be to sign a contract for 1 year, with the drivers continuing to earn the same as they had been. Foster told Sloop that that would not work; the drivers did not want it that way. Sloop replied that that was the only way the Company would sign a contract.

In agreement with the General Counsel, I find that the Respondents violated Section 8(a)(1) of the act by Sloop's above statement to Foster when negotiations for a first collective-bargaining agreement were beginning, to the effect that the Company would not sign a contract containing a pay raise in that such statement indicated it would be futile to select the Unions as bargaining agent.[83]

(b) By Murl Murphy

Terry Layman, a truckdriver, testified without contradiction that in late December 1988, his dispatcher and supervisor, Murl Murphy, gave him an envelope with his name on it.

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[83] E. I. DuPont de Nemours, 263 NLRB 159, 165.

When Layman opened it in Murphy's presence, a union authorization card fell out. Murphy told Layman that he hoped he did not find out who had sent this to him. Layman did not answer and Murphy continued that he thought he probably knew who had sent the card to Layman.

I find that by Murphy's comment to Layman that he hoped he did not find who had sent the authorization card to Layman, the Respondents violated Section 8(a)(1) of the Act by Murphy's threat to Layman that he would take unspecified reprisal against another employee, whose identity he may have surmised, for engaging in union activities.[84]

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[84] See Benmit Division, U.S. Tubular, Inc., 280 NLRB 710, 715, where the Employer, (continued...)

(c) By Blake Lovette

Blake Lovette[85] testified that he first became aware of the Unions' organizing activities in the Holly Farms transportation division on December 24, 1988. On January 4 through 6, he met with drivers at Company facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Temperanceville and Harrisonburg, Virginia; and Center and Seguin, Texas. At each of these meetings, Lovette delivered the same speech,

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[84](...continued)
inter alia, analogously had threatened to find out who signed authorization cards.

[85] Lovette, president of Holly Farms Food, Incorporated, a wholly-owned subsidiary of Holly Farms Corporation, since February 1988, after the merger became general manager and senior vice-president of the Tyson Foods Fresh Retail Division. As such, Lovette continued to be responsible for production, sales and marketing of Holly Farms and also Tyson brands fresh chicken products.

verbatim, to a total of about 180 drivers. This speech, in relevant part, contained the following language which, the General Counsel and Union argue, constituted an unlawful threat to discontinue the Holly Farms trucking operations if the employees should select a union to represent them:

> If we felt felt that we should contract out our hauling, we would have the right to propose that, too. And you may know that that is exactly what some of our competitors do.
>
> * * * *
>
> I am just telling you that no union could prevent us from reducing pay or benefits, or from going to outside contractors to haul product, or to do anything else that we do, if we in good faith thought that we had to do that for sound business reasons.

However, in the passage marked by the above asterisks and not referenced in the General Counsel's brief, Lovette's speech also contained the following:

> Now, I am not making any predictions. I am not telling you we would contract our hauling out if you brought a union in here. The truth of the matter, I prefer that we do our own hauling, union or no union, as long as we can do it and it's good business for us to do it.

I find that the above disclaimer neutralized any threat in the January speech to contract hauling should the employees choose the Unions and that the disputed passage was not unlawful.

However, on about February 18, Lovette delivered a second verbatim speech to drivers at the same loca-

tions as in early January in which he again addressed the matter of using outside carriers in the context of the Unions' organizing campaign. In this February speech, Lovette told the drivers:

> Well, we have talked a lot about poultry companies going to contractors to haul their product. We considered that back in December, and decided against it. . . . But I also told you that contracting the hauling is an option we have and will continue to have. As soon as word of this union situation got out, we got calls from people interested in buying our tractors and contracting to haul our product for us. I found out right quick it wouldn't be any problem to sell every tractor we own at a good price. And it wouldn't be any problem to hire contractors to haul our product.
>
> There is no good reason, then, for us to pay a non-competitive cost to haul our own product just be-

> cause some union should ask us to. Let me put it in plain and simple words. If you should bring this union in here to represent you, and if this union demanded a pay or benefits plan that we in good faith considered to be unsound and unjustifiable from a business point of view, there is nothing to prevent us from making a decision to sell our tractors and contract out our hauling. We might have to negotiate about the impact of that on our drivers, but would not be a problem.

The U.S. Supreme Court has stated in N.L.R.B. v. Gissel Packing Co:[86]

> . . . an employer is free to communicate to his employees any of his genera views about . . . a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a

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[86] 395 U.S. 575, 618-619 (1969).

case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that (c)onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof. 397 F.2d 157, 160.

> As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control, and not threats of economic reprisal to be taken solely on his own volition.' N.L.R.B. v. River Togs, Inc., 382 F.2d 198, 202 (2d Cir. 1967).

As further interpreted by Administrative Law Judge Roth in his Board and Court-approved decision in Blue Bird Body Company,[87] "employees because of their economic dependence on the Employer tend to 'pick up intended implications . . . that might be more readily dismissed by a more disinterested ear,' . . . the employer's statements must be carefully phrased on the basis of objective fact and

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[87] 251 NLRB 1481, 1488, enfd. 677 F.2d 112 (C.A. 11, 1982).

. . . the employer must bear the responsibility for any misleading ambiguity on his part."

Applying the above authority, I find that Lovette's February speech to employees describing how readily the Respondent would and could sell its tractors and contract out the drivers' unit work should they select the Unions to represent them, did not constitute an objectively-stated prediction of events beyond the Respondent's control, but was a coercively presented list of options available at the Respondents' whim should collective bargaining, in management's judgment, become bothersome or inconveniently expensive. In the atmosphere created by the Respondents' other unlawful conduct found herein,

I find that Lovette's February speech had even a more aggravated tendency to coerce employees."[**] I therefor, find that Lovette's February speech unlawfully threatened employees that the Respondents would sell the tractors they drove, contract out their work and take away their jobs if they should choose the Unions as their bargaining representative, all in violation of Section 8(a)(1) of the Act.

Long distance driver Gene Hester testified that, in February he went to Blake Lovette's office to personally deliver a letter from R. V. Durham, president of Local 391, challenging Lovette to debate him. The

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[**] Harrison Steel Castings Company, 293 NLRB 1158, 1159.

envelope was sealed with the Teamsters' emblem. When Hester handed Lovette the envelope containing the letter, Lovette told him that the postman usually delivered his mail, and threw the envelope to the floor. Hester picked it up and told Lovette that he wanted to talk to him about the drivers' pay. According to Hester, they then spoke for about 30 minutes, basically about compensation and certain recent Company measures that had reduced same. However, as their talk wound down, Lovette declared that he had a company to run and that he did not have time for such stuff as this Union. Lovette declared that if Hester would help him, he could win the campaign. He also told Hester, who had explained

about the pay cuts[89] and how the cost of living was rising, that he was a businessman and was not interested in people who only were interested in numbers. Lovette declared that there would not be a union at Holly Farms and, if the employees voted for representation, he would sell the trucks. During this conversation, Hester announced that because of the pay cuts, he was not interested in continuing to drive a truck. Lovette answered that he understood that there were some better positions open with Holly Farms. Hester told Lovette that he was not interested.

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[89] In 1988, Holly Farms had reduced drivers' compensation by substantially lessening what they were paid while waiting at customers' premises to be unloaded or for a different load for backhaul delivery. Fees for recovering pallets were eliminated.

Lovette recalled that the conversation with Hester had occurred on March 1 at about 11 a.m. Hester appeared at the reception area when Lovette was busy with telephone calls. After about a 30 minute wait, Lovette welcomed Hester into his office. As Lovette rose to shake hands, Hester handed him a letter displaying the Teamsters logo. Lovette stated that after he had dropped the letter onto the corner of his desk, it accidentally fell on the floor. He did tell Hester that the postman usually delivered his mail. Hester, who had sat down, suggested that Lovette read the letter. Lovette replied that he would wait to get it from the postman.

Hester told Lovette that if he wanted an end to this business, Lovette would have to rehire a former transportation manager named Lowe. Lovette replied that that would not be possible.

During their talk, Lovette informed Hester that his own job at Holly Farms had been very specifically spelled out by those who had hired him. Lovette was to get the Company profitable, efficient and competitive within the industry and that no division, specifically the transportation division, would be overlooked in those efforts. The result of the coming representation election would have no bearing on this. Lovette stated that he would work in all ways to make the transportation department

more efficient and that his options would remain open even after the election. If the Unions won the election, Lovette would have to bargain with them concerning the impact that any of his decisions might have on the drivers, but he still would have the right to haul his chickens in the most efficient way, retaining the options of selling his trucks and contracting his hauling if those ways were the most efficient.[90]

Lovette related that he told Hester that Holly Farms was a very good place to work. It provided good

[90] Lovette explained that his reference, during his conversation with Hester, to being able to sell all the trucks and to contract out hauling was not based on the then-current union campaign but on the premise that Holly Farms' conduct of its operations would not really be changed by the presence or absence of a union and that the use of contract carriers was an option available at any time.

wages and benefits. Lovette wanted to get this business behind him and get on with making good chickens and selling them well and competitively. Lovette expressed the hope that the drivers would not encumber him by bringing in a union. He described that meeting of about 15 minutes as his only one with Hester from January 1 through the time of the election. Lovette did not deny Hester's testimony that, during that conversation, he had told Hester that there would not be a union at Holly Farms; that he had asked Hester's help to enable him to win against the Union's campaign; and that, when Hester had protested the pay cuts and had stated his disinterest in continuing to

drive for Holly Farms, Lovette had offered him other work.

From Hester's undisputed testimony, I, therefor, find that Lovette's statement that there would not be a union at Holly Farms violated Section 8(a)(1) of the Act because an unlawful expression of the futility of supporting the Union.[91]

I conclude that the Respondents further violated Section 8(a)(1) of the Act by Lovette's statement, in effect, that whether the Unions won or lost the election, he had the option of selling all the trucks and contracting out hauling.[92] As the

[91] These expressions are similar to those found unlawful above in Lovette's February speech to employees.

[92] Jays Foods, Inc., 228 NLRB 423, 430, enfd. as modified 573 F.2d 438 (C.A. 7, 1978), cert. denied 439 U.S. 859 (1978) (continued...)

offer to find other work for Hester in the context of Lovette's request for his assistance against the Unions was not alleged as an unlawful inducement, I make no finding in this regard.

(d) By Curtis (Bob) Absher

Long distance drivers Teddy Ray Hayes and Harden Branscome testified to a late February conversation with head dispatcher Bob Absher. Both drivers had just returned from a trip taken together. While Hayes was completing his logs, Branscome spoke to Absher through the dispatchers' window about the forthcoming union election. Branscome told Absher that he

[92](...continued)
(threat to sell trucking operation); SMCO, Inc., 268 NLRB 1291, 1293 (threat to subcontract unit work).

was so certain that the Unions were going to win that he would quit if they lost. Absher replied that he was real sure that the Company was going to win and that, if it did, the trucks would be gone from Wilkesboro within 6 months. The Company, Absher continued, would use all the outside trucks they could to get away from having to use Company trucks.

Absher explained that he had known Branscome for about 10 or 12 years, that they had been good friends for several years and that, during the first months of 1989, Branscome had been coming to the drivers' room[93] where, in friendly fashion, he would

[93] The drivers' room, separated from the dispatching office by a half-door, was used by drivers to finish their paperwork—for signing in, picking up bills of lading and completing logs.

tell Absher, "We're going to win," and Absher customarily would reply, "No, you're not going to win." Absher recalled that on one occasion in late February, Branscome came in and, as usual, told Absher that we're going to win. Absher told Branscome that he did not think that they were going to win, adding that "They are going to use you for a scapegoat." Branscome replied that he would stay with the Company until the Unions won and then he (Branscome) would be out.

Although Absher testified that although he had been asked by the Company before the start of union activities to increase the use of outside carriers, he denied having said anything to Branscome about whether the Company was going to keep or get rid

of its tractors; whether it was going to increase the use of outside carriers or whether it was going completely to the use of contract carriers.

While, as argued by the General Counsel, the testimony of Branscome and Hayes concerning what was said by Absher is mutually corroborative, both men, as noted, were closely associated in their union activities, with each other and with Hester, suggesting the possible absence of spontaneity in their testimony. However, from Blake Lovette to John Sloop, I have found repeated references by responsible Company representatives to the possibility that, whether or not the Unions won the election, the Company would sell its trucks and contract its hauling operations. In

this context, I find that Branscome and Teddy Ray Hayes are corroborated by the general evidentiary pattern and I credit their testimony. I, therefor, find that the Respondents violated Section 8(a)(1) of the Act by Absher's statement to Branscome, in Hayes' presence, to the effect that if the Company did win the coming representation election, that the Company would stop using its own trucks and completely replace them with trucks owned by outside carriers. Even if Absher's statements to Branscome, overheard by Hayes, were made in the context of a friendly relationship and in the form of an opinion held by Absher, hi remarks nonetheless were coercive because made by an acknowledged supervisor

who professed to speak from knowledge.[94] In addition, the fact that Absher and Branscome were personal friends only served to enhance the impression that Absher was speaking on management's behalf.[95]

(e) By David Hayes

Long distance driver John E. Danner testified that, in late February, while he was in the drivers' room waiting to be sent out, David Hayes, Holly Farms' vice-president for transportation, asked to speak with him privately. Accordingly, after the two men had stepped onto the back porch, Hayes told Danner that he knew that his name was listed among the

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[94] Harrison Steel Castings Company, 293 NLRB, supra, at 1168.

[95] Colorado-Ute Electric Association, Inc., 295 NLRB No. 67 (JD 30).

members of the Unions' organizing committee.[96] Danner agreed that this was true. Hayes asked if Danner realized that this was serious. Danner replied that he did and thought that that was something the employees needed. When Hayes disagreed, Danner asked him, for argument's sake, to state his views. Hayes declared that Danner knew that if the election went through and the Unions should come in, Blake Lovette will disband transportation, remove all the trucks and all the drivers will be terminated. Danner answered that he did not think

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[96] As noted, the Unions previously had sent the Company a letter, dated December 28, 1988, the first of a series of four, identifying Danner and others as employee members of their in-plant organizing committee. Hayes also knew Danner to be a union activist since January from newspaper stories quoting Danner on the subject.

the Company could do that—not under federal law.

David Hayes, in turn, recalled that in December 1988, Danner came to his office holding a recently distributed copy of a pay change notice. Danner declared that while he knew that Hayes had had nothing to do with the change in pay he was disappointed in it. Hayes spoke to Danner about Danner's last trip. Nothing during that conversation was said about the use of outside carriers. Hayes testified that that was his last conversation with Danner and that there was no other occasion when he and Danner spoke about the Union and the representation election.

Danner impressed me as being a forthright witness whose testimony is

entitled to additional weight because of the risk he had taken in testifying against his Employer's interest while he continued to work under Hayes.[97] Also, Hayes' threat that, should the Unions win the election, the Company's trucks would be sold and that outside carriers would be retained to do the hauling is consistent with a series of like statements made to a range of employee witnesses by a variety of Company supervisors. I, therefor, credit Danner's account and find that the Respondents violated Section 8(a)(1) of the Act by Hayes' threat to Danner that should the Unions win the election, the Company's trucking operations would be

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[97] See Rodeway Inn of Las Vegas, 252 NLRB 344, 346; Gold Standard Enterprises, Inc., 234 NLRB 618, 619.

discontinued; the trucks removed; and the transportation employees terminated.[98]

William F. Johnson, a long distance driver for Holly Farms based at Glen Allen (Richmond), Virginia, testified that, in mid-February, he and other employes attended a meeting with Holly Farms officials Blake Lovette, president; David Hayes, vice-president for transportation; A. Gerald Lankford, vice-president for human resources; and Pete Lovette, treasurer.[99] During the meeting, Lankford told the employees how much more money they could be making, explaining that if the Company removed

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[98] Jays Food, Inc., 228 NLRB, supra, at 430.

[99] Pete Lovette formerly had headed Holly Farms' transportation division.

four trucks from the plant, the remaining drivers could obtain much better mileage and, thereby, increase their earnings.

Johnson related that on April 16, after the election, having just returned from a trip, he asked Raymond Strong, a dispatcher,[100] if he was going to get back out that night. When Strong said no, Johnson asked why, indicating that four trucks were being loaded outside. When Johnson finished his paperwork at about 1:30 p.m., he called David Hayes and reminded him that the men had been told in February, that if four trucks were taken out of operation, the remaining drivers would get more mileage and

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[100] Strong's supervisory status is admitted.

money. Hayes remembered this, but told Johnson that he had gone his way and joined the Union anyway. Accordingly, Hayes had to have some trucks to cover himself. Johnson asked if that was all that Hayes had to say. When Hayes started to say something else, Johnson hung up.

Hayes recalled that on April 16, Johnson had phoned him at his Wilkesboro office, telling Hayes that he had run trips that week of about 130 miles each and that he could not live off the proceeds of such mileage. Hayes replied that the Company was doing all it could, was trying to get him more miles and asked for more time. Johnson retorted that he did not believe Hayes. Hayes related that this was followed by about 10

minutes of discussion centered around Johnson's complaint that, in spite of the Company's February promise and the layoff of certain Richmond drivers, the remaining Richmond drivers had not received any additional mileage. Hayes, in turn, outlined various measures that the Company had taken to obtain more business, including where it had picked up new accounts. He tried to assure Johnson that the Company was trying everything, even to the point of having laid off drivers in Glen Allen, Temperanceville and Wilkesboro, in order to create additional mileage for the remaining drivers.

When Johnson told Hayes that he did not believe him, Hayes answered that he was sorry, but if Johnson had

patience, Hayes was sure that the situation could be turned around. Johnson declared that the drivers were not going to stand for this. Hayes, interpreting this statement as a drivers' strike threat, informed Johnson that if the drivers did strike, the Company would continue to do business and use outside contractors. When Johnson asked if that was it, Hayes said yeah. Johnson hung up abruptly.

I credit Johnson's account of his April 16 conversation with Hayes. As argued by the General Counsel, descriptions of this conversation by both Hayes and Johnson are similar, except that Hayes' account does not contain the controversial statement charged by Johnson to the effect that

Hayes had told Johnson that he was not receiving longer trips, more mileage and more money because he had joined the Union. Johnson impressed me as a candid, if not particularly benign witness who did not oppose the layoff of other drivers if that could result in more work for himself. Johnson's basic question to Hayes was that if, as promised, greater mileage could be made available to the remaining drivers by the layoff of other drivers, where was his share of the resulting extra work? Since such a position does not cast the proponent in a particularly favorable light, it is less likely that it would be told if not true. Accordingly, I find that the Respondents, through Hayes, violated Section 8(a)

(1) of the Act by retaliating against Johnson for having joined the Union by not providing promised additional mileage.

In assessing Hayes' general credibility, I note that in a speech delivered during the week of January 13 to groups of Holly Farms drivers, successively, at Wilkesboro, Monroe, Glen Allen, Temperanceville and Harrisonburg, he made the following statement at a time when, by his own testimony, he was actively espousing reductions of the Holly Farms truck fleet, had already made two such reductions and was contemplating additional cutbacks:

> I heard them [Holly Farms drivers] . . . . talking about these independents being a sorry bunch, and so on, and how much better off company drivers are. I

> agree with that, and I certainly prefer to run our own equipment, with our drivers. If Holly goes to outside contractors, I stand to lose my job.

While hyperbole is to be expected in pre-election propaganda, Hayes' above-exemplified misrepresentation to defeat the Unions was sufficiently excessive to weight adversely upon his credibility.[101]

(f) <u>The no access/no solicitation rule at the parking lots and related incidents</u>

(i) The threats to arrest employees

Long distance drivers John E. Danner and Robert Gwyn Wyatt testified that on April 3, after the Unions had been certified as bargaining repre-

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[101] The General Counsel, in their brief, do not argue, and I, from review of the text, do not find that Hayes' hard-line speech to employees during the week of January 13 violated Section 8(a)(1) of the Act.

sentative for the drivers-yardmen unit employees but while organizing efforts still were in progress among live haul unit and plant employees, they and driver Dennis Lackey were in the middle of one of the parking lots at the Holly Farms Wilkesboro complex passing out union literature to employees leaving work at the main plant and at the nearby Food Service (Convenience Foods) facility. Wyatt, without contradiction, denied that he and the two others had obstructed traffic or had interfered with the Respondents' business. At around 2:15 p.m., after they had been on the lot for about 15 minutes and had handed out a few handbills, a Company security guard approached and asked what they were doing. Whey they explained, the guard told them that Gerald Lankford[102] had said they all would have to leave. As off-duty employees, they had no business on Company property. Wyatt protested that they had a legal right to do what they were doing. The guard left and in about 10 minutes returned with another security guard and a city policeman. The policeman told the three men that Lankford had said that they were trespassing and that they would would have to leave the Company's property or he would arrest them. The employees were not allowed on Company property during non-work time. The three men decided to leave

[102] As noted, Lankford, at the time, was Holly Farms vice-president for human resources.

rather than to face arrest and, possibly, jail.[103]

(ii) The arrests of three employees

Drivers Gene Hester, Teddy Ray Hayes and Harden Branscome related, in this synthesized account, that on that same day, April 3, they, too, were in another parking lot of the Wilkesboro complex also to distribute union literature to employees as they left work. The three men had positioned themselves about 10 feet from the main plant door. At that time, about 2 p.m., the shift was about to end and the men, in fact, did give handbills to some emerging employees.

Soon thereafter, a Company guard approached and asked if the three men

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[103] Differences in detail between the descriptions by Wyatt and Danner of the April 3 incident are not consequential.

were Holly Farms employees. Hester answered yes. Another guard then came up and requested that the men move away from the entrance and further onto the parking lot. The men complied. When the men left their station near the plant door and moved close to the parking lot exit, the guard asked them not to put any handbills on the windshields of the employees' cars. Hester reassured the guards that he would not put handbills on the windshields and volunteered that he would not give handbills to employees going into the plant because they might throw them on the floor. Soon, four or five guards were on the scene. They asked the men to move out onto the street, off Company property. The three men

refused. Larry Church, in charge of safety and security at the Wilkesboro complex, then arrived, telling the men that they would have to leave. The men replied that they would not leave or move out onto the street; they had a right to handbill employees. After speaking on his portable phone, Church told the men to leave several times and warned them that if they did not move, they would be arrested. Wilkesboro Chief of Police Gary Parsons next came onto the scene, accompanied by a deputy, and gave the three men 15 minutes to leave. The men responded that they were not going to leave. After repeating his order several times, Parsons told the men that they were under arrest. Hayes and Branscome got

into the police car while Hester followed them to police headquarters in his own vehicle.

The three men were arrested under warrants issued pursuant to a Holly Farms' complaint, signed by Church, charging first degree trespassing. They never were locked up but sat in the lobby of police headquarters for about 2 hours, after which they were released in their own recognizance. Charges against the three men were dropped at an August 16 court appearance.

Hester testified without contradiction that on April 3, while they were seated in the lobby, Magistrate Mary Louise Canter, who later signed their releases, passed through. The magistrate told Hester that a re-

straining order had been signed limiting his activities on Company property. He could go to and from work at the transportation office, but nowhere else. Hester never actually saw this order. However, months later, on about August 1, he received further confirmation of the order's existence when he found it necessary to call safety and security supervisor Church for permission to speak to employees in the cafeteria at a time when, he had learned, Tyson representatives were going to be meeting there with employees. During that call, Church, answering Hester's inquiry, told him that there, in fact, was a restraining order against him and that Church personally did not have authority to grant Hester's re-

quest. When Hester, at Church's suggestion, called back soon thereafter, Church told him he could go to the cafeteria as long as he did not distribute union materials.

(iii) The written warnings

On about April 6, a few days after they were arrested and released, Hester, Branscome and Teddy Ray (T. R.) Hayes, during separate interviews with transportation vice-president David Hayes, were given written warnings dated April 3.

On April 6, T. R. Hayes was called into David Hayes' office to meet with David Hayes, head dispatcher Bob Absher and outhaul manager Barry Wood. David Hayes told T. R. Hayes that the written warning he was giving him was for the April 3 incident in the park-

ing lot. It was Holly Farms' policy not to allow solicitation at any time, or of any kind, on Company property and that, if T. R. Hayes did anything further, more severe disciplinary action wold be taken against him. T. R. Hayes then was given the written warning. Nothing more was said.

A written notice also was given to Hester. Branscome related that after learning of the warnings administered to T. R. Hayes and Hester, he called David Hayes who confirmed that such a written warning also was waiting for him, which Branscome later received.

The reason for the warnings as set forth in the notices given to T. R. Hayes and Branscome was "Failure to follow instructions of Holly Farms

Senior Management on 4-03-89. Further occurrences will result in more severe disciplinary action." In the warning given to Hester, the above first sentence was the same, but the second sentence was replaced by the following: "This is the third written warning involving this employee. Next disciplinary action will result in discharge."

David Hayes did not recall having said anything about solicitation during these warning interviews. When he spoke to T. R. Hayes on April 6, he told that driver that he had to give him a written warning for failure to follow the instructions of Holly Farms senior management on April 3, 1989. He asked T. R. Hayes to sign the document and then he,

too, signed. Absher recalled that Barry Foster, another driver, had attended on T. R. Hayes' behalf but that Foster had said nothing.

David Hayes testified that his discussions with Hester and Branscome, also attended by Wood and Absher, did not differ significantly from his talk with T. R. Hayes. Branscome merely had expressed displeasure that the Company had had him arrested. Hester, during his disciplinary interview, had declared that things had not been done properly; that he had a right to do what he had been doing. Hayes replied that he had not made that decision but since Hester had known that the parking lot was a secured area, he should not have done what he did. Hester again

protested that Hayes was wrong. The three men received copies of their warning notices.

(iv) Prior practices

Hester, Branscome, T. R. Hayes and other employees testified that before April 3, no restrictions had been placed on off-duty employees' access to the Company's parking lots. During the Unions' campaign to organize the drivers and yardmen, which led to the March 9, 10 and 11 election for that unit, Hester related that he had spent much time in and about the transportation department parking lot. T. R. Hayes reported that, before April 3, he used to go through the same parking lot to visit the office of the workers compensation representative; that he had parked in

and passed through Company parking lots while patronizing cafeterias in all the complex plants and while purchasing chickens at the Company's retail store—all without incident.

Most conspicuously, however, it is undisputed that during the 3 days of the drivers-yardmen election, on March 9, 10 and 11, employees active for the Unions had set up a hospitality stand in a parking lot near the dispatchers' office where, from the back of a pickup truck, they served coffee and doughnuts to employees who either were coming in to vote or were leaving the voting place. This truck, which operated from 9 a.m. to 9 p.m. during all 3 election days, was variously manned by Hester, Danner, Wyatt, Branscome,

T. R. Hayes and others who, in addition to the refreshments, also gave out caps displaying the Teamsters logo, license plates, authorization cards and union literature. While this hospitality stand was open, members of management and supervision, including Blake Lovette, David Hayes, John Sloop and Gerald Lankford had stopped by, spoken to and even briefly socialized with the employees operating the stand. Wyatt testified that on March 11, at about 10 a.m., while the polls were open, Blake Lovette pulled up to the stand where Wyatt was passing out coffee and doughnuts and told Wyatt that he would be better off learning to drive on ice rather than participating in union activities. Wyatt replied that he

felt that Lovette had done a good job for the Company in raising its profits and stock prices, but that Lovette just did not know anything about human relations. Lovette told Wyatt that he could see that the two of them never were going to agree, and drove off.

The record is clear that in spite of Holly Farms' knowledge that the hospitality truck was actively functioning in its parking lot near the transportation office during 3 voting March days, the Company did not interfere with its operations or suggest the stand be closed or moved. The General Counsel and Unions argue that it only was after the Company was surprised by the Unions' success in winning that election that, for

the first time, it restricted access to its parking lots by off-duty employees. The Company did that to make more difficult the Teamsters' continuing campaign to organize Holly Farms' live haul and production employees. These parties assert that some of the same employees who had been permitted access to the Company parking lot to operate the hospitality stand in early March, less than a month later, were threatened with arrest, actually arrested and were given written warnings for continued union handbilling in parking lots that suddenly had become off-limits.

Larry Church, in charge of safety and security at Holly Farms' Wilkesboro plant, basically confirmed the details of the April 3 arrests of

Hester, Branscome and T. R. Hayes, which occurred pursuant to warrants sworn by himself. Church contends that this was done in accordance with Rules 6 and 7 of Holly Farms General Post Orders, issued to the entire security department. These rules, in effect for many years, were revised by Church in April 1985, since which time they have remained unchanged. The relevant rules of the General Post Orders are as follows:

> 6. Must keep constant alert on employee parking lot for theft, loitering, etc.
>
> 7. The distribution of non-Company literature throughout the Company parking areas on windshields of vehicles or otherwise shall be strictly prohibited.

Church explained that the Company's east and west side parking

lots are secured areas, enclosed by fences, and that Hester, Branscome and Hayes were arrested when they refused Company requests that they leave the western lot.

Vice-president for human resources Lankford testified that it was he who had made the decisions concerning the arrests after being notified of the handbilling activities on the two parking lots. Lankford initially had directed security guards to tell the men to move to the entrances or to pass out their literature on the sidewalks, but not to remain on the parking lots. After receiving the guards' report that the three persons in the smaller lot south of the food service plant had left, he had sent Church to the other parking lot when

the three men there had refused to leave. Lankford also summoned the police and finally ordered the arrests when the handbillers had remained adamant.

(v) Policies concerning access and distribution

Lankford explained Holly Farms' policy concerning access to its property by the general public during the first half of 1989. Persons other than employees were permitted to come onto Company property, to park their vehicles in the parking lots and to have meals in the cafeterias. Members of the public also might visit someone's office for particular purposes, take guided tours of the Company's plant and purchase chickens at the store. Visitors could park in the lot and proceed to their destina-

tions, but they could not loiter in the parking lots or in any other secured areas. Employees not on duty enjoyed the same access to Company property, including its parking lots, as did outside visitors.

In 1988-1989, employees were not allowed to solicit for any purpose on Company property. According to Lankford, this rule had been put into effect 5 years before when, after the Company had permitted farmers to come onto Company parking lots and streets to sell apples and other produce, matters had become uncontrollable. The opened areas had become crowded with people trying to sell miscellaneous items and who had papered windshields with advertisements.

Accordingly, a decision was taken to prohibit all activities in the parking lots, including distribution of materials and the placement of anything on windshields, and to make the parking lots totally secure. This policy, since then, has been enforced with regard to both employees and outside visitors, all of whom were prohibited from soliciting, handing out literature or from doing anything in Company-owned Wilkesboro parking lots besides parking their cars and moving on. Lankford testified that the decision to secure never was published in written form or generally communicated, but that the Company merely had secured its parking lots by use of its security personnel who communicated these

rules to anyone who attempted to solicit or advertise in those places. As part of the security operation, Holly Farms had been erecting fences, which it continued to do, around the lots and had begun to use cameras transmitting video images of the lots to a centralized guard station. The use of the video camera began before the mid-February 1988 death of Holly Farms then-chief executive officer, Sam Zimmerman, who had authorized the same, and the number of security guards was increased, with roving guards being assigned to go through both the plants and the parking lots.

Blake Lovette and Everett (Skipper) Solomon[104] cited unsettled prop-

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[104] Solomon, Holly Farms division vice-president, North Carolina, after the July
(continued...)

erty title to distinguish the small parking area where pro-union employees had set up the hospitality stand during the March election from the other, more secured, completely fenced parking areas. Part of the site where the hospitality stand stood had been acquired several years before when Holly Farms, needing additional parking space at its Wilkesboro complex, had purchased a small plot for such purpose from the Duke Power Company. At about the same time, Holly Farms had taken a non-warranty deed on a smaller adjacent parcel of land, also to be used for parking. The stand and the parked

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[104](...continued)
1989 takeover, became Tyson's regional manager, North Carolina, with basically the same duties—which included management of the Wilkesboro complex.

vehicles of those who operated it were spread over both adjoining parcels. The non-warranty deed was prepared because, as the owner of the relevant plot was unknown, Holly Farms then could use the property openly and, years later, acquire title to it by adverse possession.[105] Accordingly, while no one had claimed the smaller plot, Holly Farms did not, itself, yet own the land and was concerned that someone still might claim the property.

Both the lot acquired from Duke Power and the disputed adjacent lot, gravelled over, were used for Holly Farms transportation drivers' parking

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[105] Under the North Carolina rule, a party might achieve title to disputed realty after 7 years of open, notorious occupancy and use.

and, also, for random, unassigned and overflow parking.

The Respondents' point, as described by Blake Lovette, is that since, at the time of the March election, the Company did not have clear ownership of the entire plot of land where the hospitality stand had been set up and, as the drivers' vehicles had been parked both in the area purchased from Duke Power, which the Company owned outright, and on the title-disputed plot, the Company had not asked the drivers running the stand to leave. This was because, as Lovette explained, he could not do so if the Company did not own the land outright. He noted that the drivers had not been bothering him. Lovette also conceded that the ownership is-

sue had not prevented Holly Farms from using that area as it had any of its other parking lots. The record also shows that, before and at the time of the March election, the area where the hospitality stand was located displayed the following sign, positioned so as to apply to both properties:

NOTICE
No trespassing
Solicitation or distribution
of materials allowed on
Company property at any time

Rabon E. Roten a Holly Farms day shift security sergeant who has continued in that capacity under Tyson and who was present when Hester, Branscome and T. R. Hayes were arrested, testified that, when those arrests occurred, he had not known that title to the property where the

drivers had had their March election hospitality stand was in dispute. He had learned of this only well after the start of the hearing in this proceeding, and almost a year after he had replaced the above existing faded signs on that property with like signs that were easier to read.

(vi) The parties' positions; discussions and conclusions

The General Counsel and Unions contend that the Respondents' actions in threatening to arrest the six above-named employees, and in causing the actual arrest of three, for handbilling on two Company parking lots were discriminatory and were for breach of an unlawfully broad no access/no solicitation rule that Holly Farms had begun to enforce only after the Unions were successful in the

March election for the drivers-yardmen unit. They assert that the rule was then maintained and enforced strictly and selectively to thwart the Unions' continued organizing campaign among the Company's live haul unit and production employees. These parties argue that Holly Farms' readiness to tolerate the drivers' hospitality stand in a Company parking area for 12 hours a day during all 3 days of the March 9-11 election was a conspicuous example of the Respondents' selective enforcement of that policy. The General Counsel and Union also assert that the Company thereafter further violated the Act by discriminatorily issuing written warnings to the three employees who had been arrested for union handbill-

ing, and by telling employee T. R. Hayes, when giving his written warning, that it was Holly Farms' policy not to allow solicitation at any time, or any kind, on Company property.

The Respondents, in turn, argue that the security rules restricting access to its parking lots by off-duty employees and others had been in effect for at least 5 years; had been promulgated for reasons described above unrelated to the Unions' campaign, which included theft prevention; had been distributed for years to the security force; and that the secured status of the lots, for the most part, long had been rendered conspicuous by fencing, by guard patrols and by posted signs. The Re-

spondents contend that the hospitality stand was permitted during the March election because, in part, it had been set up on land to which Holly Farms did not have clear title and because, as a practical/tactical matter, it did not appear logical to initiate a confrontation with employees while a representation election was in progress.

In Tri-County Medical Center, Inc.,[106] the Board stated the applicable rule that a no-access rule concerning off-duty employees is valid only if it:

> . . . (1) limits access solely with the respect to

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[106] 222 NLRB 1089. Also see 299 Lincoln Street, Inc., a wholly-owned subsidiary of Broad Reach Health Services, Inc., 292 NLRB 172, 187; NLRB v. Pizza Crust Company of Pennsylvania, Inc., ___ F.2d ___, 129 LRRM 3002, 3006 (C.A. 3, 1988), enfg. 286 NLRB 490.

> the interior of the plant and other working areas; (2) is clearly disseminated to all working employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside non-working areas will be found invalid.

Here, as in Tri-County Medical Center, supra, the record shows that Holly Farms did not inform its employees of the existence of the General Post Orders restricting their access to the parking lots while off-duty, except, perhaps, on ad hoc bases not described in the record. Rather, safety and security supervisor Church testified that Rules 6 and 7 of the Company's General Post Or-

ders, which governed the security guards' actions in this matter, were distributed only to members of the security department; were not published or given to non-security employees and were made known to employees or outside visitors only when the security department employees enforced those rules against them. Lankford also testified that the Company's 5 year old decision to secure the parking lots likewise was never announced to employees.

Holly Farms' application of its no-access rules against off-duty employees in the present case is also invalid because the rules, as stated in Item 7 of the General Post Orders and the erected parking lot signs, do not clearly limit access solely with

respect to interior, or other work areas or as to worktime. As noted by the U.S. Court of Appeals, Third Circuit, in NLRB v. Pizza Crust Company of Pennsylvania, Inc., supra, an employer may not prohibit its employees from distributing union literature in nonworking areas during nonworking time absent a showing that such a ban is necessary to maintain plant discipline or production.[107] There was no showing by the Company to either effect. The Respondents did not seek to establish that, on April 3, the six off-duty employees in the two parking lots interfered with vehicular traffic, employee ingress or egress, employees at work or that

[107] Eastex, Inc. v. NLRB, 487 U.S. 556, 570-571 (1978).

they created a disturbance. The Company merely was opposed to the employees' being where they were and doing what they did.

The record also shows that in spite of the restrictions on access set forth in Rule 7 of the General Post Orders and on the signs erected in the area, Holly Farms did not consistently enforce these restrictions, as indicated by its acceptance of the hospitality stand during the 3 day election. The Respondents' argument that it had not closed the stand because it did not have clear title to all the land where the stand and associated vehicles were located is unconvincing. Ever since acquisition, the Respondents had been using the two relevant adjacent plots as a sin-

gle parking lot with no material distinction from the Respondents' other Wilkesboro complex parking lots, except as to fencing, which was a continuing project on the Respondents' property. Holly Farms had positioned the erected sign posting restrictions so as to be applicable to both plots; had gravelled both parcels uniformly; and had not made known the existence of any question concerning property rights either to its employees or to its security personnel who were charged with enforcement.

Accordingly, I find that Holly Farms violated Section 8(a)(1) of the Act by repeatedly and disparately enforcing its no access/no solicitation rule to discourage employee

union activity;[108] by promulgating and enforcing an unlawfully broad no access/no solicitation rule affecting its premises;[109] and by threatening employees Wyatt, Lackey, Danner, Hester, Branscome and Hayes with arrest if they did not quit union handbilling on the Employer's premises in breach of its unlawful no access/no solicitation rule.[110] The Respondents violated Section 8(a)(3) and (1) of the Act by causing the arrests of Hester, Branscome and Hayes because, in the applicable circumstan-

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[108] 299 Lincoln Street, Inc., et al., supra (JD 22); Tri-County Medical Center, supra.

[109] 299 Lincoln Street, Inc., et al., supra.

[110] Roadway Package System, Inc., 302 NLRB No. 159, sl. op. 3; The All American Gourmet, 292 NLRB 1111, fn. 2; Medical Center Hospitals, 244 NLRB 742, enfd. 626 F.2d 862 (C.A. 4, 1980).

ces, they would not stop their handbilling;[111] and by David Hayes' issuance of written warnings to the three previously arrested employees in retaliation for their continued union activities and in enforcement of the Respondents' unlawful no access/no distribution rule.[112] I finally find that the Respondents also violated Section 8(a)(1) and (3) by David Hayes' April 6 statement to T. R. Hayes, when giving him the written warning, that it was Holly Farms' policy not to allow any solicitation at any time or of any kind, on Company property and that, if T. R. Hayes did anything further, more severe disciplinary action would be taken against him.[113] In so concluding, I accept T. R. Hayes' account of what was said to him at the time because consistent with the Respondents' actions in this regard.[114]

[111] Medical Center Hospitals, supra.

[112] Funk Manufacturing Company, 301 NLRB No. 15, sl. op. 4.

2. The alleged Section 8(a)(1) violations affecting live haul unit and other employees—facts and conclusions

Holly Farms' live production division within the Wilkesboro complex and in outlying facilities encompassed hatcheries, feed mills, feed hauling, the growing of broilers and the live haul department, which was

[113] Ibid.

[114] The U.S. Supreme Court's recent decision in Lechmere, Inc. v. NLRB, ___ U.S. ___, 139 LRRM 2225 (1992), which limits the access rights of non-employee union organizers to an Employer's premises for organizing activities, of course, is inapplicable here as that case did not restrict access for such purposes by the Employers' employees.

responsible for catching and transporting chickens to the Wilkesboro processing plants. While the Board, in its decision and direction of election in Case 11-RC-5583 found certain live operations, such as the hatcheries, to be exempt under the Act because agricultural, the Board did order an election among employees in Holly Farms' live haul department, part of that Company's live production division, which included chicken catchers and live haul drivers. The chicken catchers, after punching in at the live haul timeclock in the Wilkesboro complex, were driven to the growing areas where the broilers were raised. There, they caught and caged the chickens for transportation to the processing plant on flat-bed

trucks by the live haul drivers. These drivers operated the vehicles used to move the chicken catchers and poultry between the growing farms areas and the plant. Also included as part of the "live haul" unit were feed mill, feed hauling and service center employees at Roaring River, North Carolina.

As noted, while the drivers-yardmen unit of the transportation department was jointly represented by the seven local unions, only one of those locals, Local 391, herein the Union, had petitioned—on February 16—for an election among the above live haul unit employees. Local 391 was unsuccessful at the July 27 election. While the Teamsters also concurrently conducted an organizational

campaign among production workers, no election petition was filed as to them. What follows is consideration of Respondents' conduct during Local 391's campaign alleged to have interfered with the rights of live haul unit and other employees under Section 7 of the Act.

(a) By Charles Robert (Bob) Sebastian

The General Counsel contends that Sebastian, then-manager of the Holly Farms Wilkes hatcheries, engaged in surveillance of union meetings during 2 days. The Respondents deny both Sebastian's unlawful conduct and his supervisory status.

Hatchery division employee Terry Osborne[115] testified that on July 15,

[115] Osborne, who has continued in the employ of Tyson/Holly Farms in the North (continued...)

at approximately 2 p.m., as he pulled his vehicle into the Days Inn Motel parking lot in Wilkesboro to attend a meeting called by Local 391, to be conducted there by Local 391 organizer R. W. Brown, he saw Bob Sebastian, manager of the Holly Farms Wilkes hatcheries, move his van from a remote parking space on the Days Inn lot to a space closer to the front of the motel, passing Osborne in the process. Osborne then entered the motel to attend the session in one of the meeting rooms. About 25-30 em-

[115](...continued)
Wilkesboro breeder division, reported that Local 391 had scheduled three July 15 meetings for the Days Inn facility. The hatchery division employees' meeting was set for 2 p.m.; the processing employees were to meet at 4 p.m.; and the transportation employees were scheduled for 6 p.m. As a hatchery employee, Osborne would have been excluded from the live haul unit found appropriate by the Board in Case 11-RC-5583.

ployees also were present. When Osborne briefly looked outside the motel about a half-hour later, he saw Sebastian, shirtless and wearing Bermuda shorts, seated at a pool-side table facing the hall entrance to the pool area at about 50-60 feet from the Union's meeting room. Within a couple of minutes, Osborne returned to the meeting. When Osborne finally left the premises, he saw no Company supervisors in the area.

Live haul driver James Phillip Church also testified that in mid-July, while he, too, was at the Days Inn to attend a union meeting, he saw Sebastian, dressed casually, pass through the motel's outside hallway between the meeting rooms. Church related that, when he spotted Sebas-

tian, he had just come out of the conference room where his union meeting was held.[116]

Osborne related that on July 22, at about 3 p.m., he attended another union meeting at the same Days Inn.[117] When Osborne heard someone say that Sebastian was out there again, he stepped into the hall and saw Sebastian by the pool, attired in a shirt and jogging pants. Sebastian was about 20-30 feet from Osborne and was looking away from the motel. Osborne did not say anything to Sebastian.

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[116] Church related that although he and Sebastian worked in different areas and he had not seen Sebastian exercise supervisory authority, he knew who Sebastian was, having met him occasionally over a 10 year period.

[117] On July 22 the Union again had scheduled meetings with the same groups of employees and in the same sequence as on July 15.

Sebastian[118] testified that during the summer of 1989, he had continued

[118] Sebastian related that 5 supervisors and 15 hourly-rated hatcheries employees, including 8 chick haulers and 7 egg haulers, reported directly to him as manager of the Respondents' Wilkes hatcheries. About 95 hourly-paid employees also reported to him indirectly through the 5 supervisors. The parties stipulated at the hearing that Sebastian exercised sufficient authority over the hatcheries employees to functionally qualify him as a supervisor and an agent of the Respondents within the meaning of Section 2(11) and (13), respectively, of the Act. However, the Respondents contend that since Sebastian supervised only excluded agricultural hatcheries employees, he was not a supervisor and agent under the Act. While the General Counsel agree with the above-described level of Sebastian's authority and with the functions attributed to him, the General Counsel assert that Sebastian supervised both exempt agricultural employees and non-exempt persons who qualify as employees within the meaning of Section 2(3) of the Act. However, the General Counsel did not identify employees supervised by Sebastian who were non-agricultural and, therefor [sic], non-exempt. As the Respondents argue, Sebastian may not be a supervisor within the meaning of Section 2(11) of the Act because he exercised authority only over individuals who were exempt under Section 2(3) of the Act. Nonetheless, as a member of the Respondents' management with what otherwise would be conceded supervisory-level responsibility for overseeing a Respondents' operation employing some 115 individuals, he, at least, must be considered, and I find that he was, a Respondents' agent within the meaning of Section 2(13) of the Act.

his practice of the preceding 10-15 years of going to the Days Inn pool to relax in the sun practically every summer weekend from his home about 4-5 miles away. In 1989, as before, even while the motel had been owned by Days Inn's predecessor, Holiday Inns, he followed this custom. He had started going to those premises for entertainment when it was a Holiday Inn because on Friday and Saturday nights there was a dance band. In that earlier period, he had become friends with the Holiday Inn manager and assistant manager, who had given Sebastian and his friends access to the motel pool. However, since Days Inn took control of the motel, about 2 years before, Sebastian no longer had a relationship with the motel's

management and there was no band. Nonetheless, although he kept a boat on a lake approximately 8 miles from his home, Sebastian continued to go to the Days Inn pool more than six times a month during the summers. He had been doing this for a long time, enjoyed it and had not been prevented from continuing by Days Inn management.

Sebastian averred that during the summer of 1989, while at the Days Inn, he did not see any Holly Farms' employees; that he did not know Phillip Church; that he had seen no live haul personnel;[119] that no one from Holly Farms had asked him to go to

[119] The Respondent's live haul operation in Wilkesboro was approximately 3 miles from the hatcheries. Sebastian had last worked in live haul, as a supervisor, about 20 years before.

Days Inn and report what he saw there; and that he did not write the names of anyone at that motel. While, as he later learned, a union meeting may have been in progress while he was at the motel, he denied having known of any such meeting at the time.

I credit Sebastian's denials that he was at the Days Inn pool on the dates in question to conduct surveillance of the union meetings that were in progress while he was there. The Days Inn is a public place and its pool could well have had an inviting appeal on hot summer days. Sebastian's testimony that his long-time use of that pool, both under Holiday Inn and Days Inn managements, is uncontradicted and, contrary to the

General Counsel, there is no convincing evidence in the record that Sebastian, apart from his mere presence, engaged in conduct inconsistent with his claim of pool-side relaxation. Although meetings of hatcheries workers also were conducted while Sebastian was at the motel and he might be expected to recognize them, since the Board previously had excluded hatcheries workers from the Act as exempt, I cannot in any event find that surveillance of their union activities, as described by Osborne, was prohibited under the Act. However, even if I were to find that Sebastian had been spying on the hatcheries workers' union activities, which I do not, it would be difficult to extrapolate to a further determi-

nation that he also must have been there to spy on the scheduled meetings of the live haul and transportation employees since the record contains no foundation evidence that he would have recognized them.[120] The Wilkes hatcheries, managed by Sebastian, were approximately 3 miles from the live haul operation, and Sebastian had not worked in live haul for 20 years. There is no showing that he had had any contact with the transportation employees so as to be meaningfully able to report on their union activities and Sebastian's option of using his boat does not translate into a legal obligation to spend his summers in it. According-

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[120] In addition, Osborne testified that by the time the July 15 meeting he had attended was ended, Sebastian was not in sight.

ly, I find that Sebastian, as the Respondents' agent, did not violate Section 8(a)(1) of the Act by conducting surveillance of the Respondents' employees during 2 days in July.

(b) By Ray Lovette

Live haul drivers Dennis G. Dimmette, Burl Parsons, Joseph Phillips and James Phillip Church testified concerning their respective interviews with live haul department manager Ray Lovette,[121] in late February

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[121] Lovette's duties as live haul manager, Wilkesboro, included supervising the movement of poultry from the grow-out farms under contract to the Respondents to the processing plant in the Wilkesboro complex, and entailed general supervision of the chicken catching crews, consisting, as noted, of chicken catchers and live haul drivers. Lovette, with the assistance of two superintendents and 12 supervisors, oversaw the work of approximately 165 employees.

Live haul drivers in the live production department were distinct from the long distance and local drivers within the trans-

(continued...)

and early March,[122] when Lovette arranged to meet individually with each driver in supervisor Tommy Eller's office. Eller did not attend these interviews.

Parsons testified that, on February 16, Ray Lovette called him into Eller's office and asked how Parsons felt about the Union. Parsons replied that the men needed something to help them; they could not make it on a 4 day workweek. Lovette asked

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[121](...continued)
portation division. Live haul drivers, unlike the transportation drivers, did not make deliveries to customers, but merely transported the chicken catchers to the grow-out farms and, operating flat-bed trucks, moved the caged chickens to the processing plants. On occasions during the summers, live haul drivers not otherwise occupied, might be assigned to water tank trucks to spray-cook chicken houses and chickens.

[122] Although Church testified that his talk with Lovette took place in May, I conclude from the weight of the evidence that it had occurred during the first week of April.

how the Union could help the men. It couldn't get them more time. Parsons answered that it might get them a wage increase. Parsons related that, until then, he had not worn union insignia or otherwise revealed his union sympathies.

Dennis G. Dimmette related that his interview with Ray Lovette occurred in early March. Lovette asked how Dimmette felt about the Union; if it had helped him. When Dimmette answered that the Union already had helped him, Lovette wanted to know how. Dimmette replied that it already had helped him because Lovette, for the first time, was showing enough interest to ask questions about his problems at work. In response to Lovette's inquiry as to

what Dimmette's problems were, Dimmette told him that his biggest problem was that he only was working 4 days a week and that it was hard to live on the money he was taking home. Lovette reassured Dimmette that he knew this was a problem, and that he was going to try to get the employees more time. Lovette told Dimmette that Holly Farms did not want a union.

Dimmette related that from 2 weeks to a month after this conversation with Ray Lovette, the live haul employees began to receive 5 workdays per week.

Joseph Phillips testified that, on about March 1, after Ray Lovette had gathered together a group of live haul drivers who had just completed

their shifts, including himself, and had taken each driver, separately, into supervisor Eller's office. When Phillips was reached, Lovette asked how Phillips felt about the union. Phillips replied that he felt very strongly. Lovette asked why. What did Phillips feel that the Union could do for him? Phillips told Lovette that he did not know. The Union had offered to help; Holly Farms had not. Lovette then told Phillips that the Union would not be at Holly Farms and that anyone caught distributing literature on the Company's property would be dismissed. Then, because Phillips was displeased about insurance coverage, the two men spoke for about 20 minutes more about the insurance plan.

James Phillip Church averred that Ray Lovette, in an upstairs area in the live haul building, told him that he knew that Church worked for Local 391. When Church asked how Lovette knew this, he was told that Lovette had a letter on his desk stating that Church worked for the Union.[123] Lovette did not answer Church's request to see the letter, but asked what was the problem. Church, too, told Lovette that the employees did not get enough worktime (with only 4 workdays a week) and did not make enough money. Lovette stated that he was going to try to get the employees 5

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[123] Church testified that his organizing efforts for the Union among the live haul employees had been quite open. He had handbilled, mostly in the parking lot, and had given out authorization cards. To his knowledge, however, no supervisor had been around when he was handbilling.

workdays a week and more money. By the end of May or the start of June, the live haul employees began to work 5 days workweeks.

Ray Lovette agreed that, during the first week of April, he did meet with all 36 Holly Farms live haul drivers, including Dimmette, Parsons, Phillips and Church, in a series of one-on-one interviews in Eller's office. These had resulted from a roundtable conversation chaired by Holly Farms' vice-president for North Carolina operations, Everett (Skipper) Solomon, and joined by Lovette; by the Holly Farms' vice-president for human resources Lankford; and by Lovette's immediate supervisor, Samuel S. Whittington, live production manager, Wilkesboro. Those present

agreed with Solomon that since the employees had felt that they needed a union, it was necessary to talk to them to find out what the Company had been doing wrong. Accordingly, it was decided to meet with the employees for that purpose and to try to correct any problems uncovered. The conference between Lovette, Solomon and the other supervisors where it had been decided to conduct these interviews had taken place during a hiatus period, shortly after March 27, when the February 16 petition in Case 11-RC-5583 had been dismissed, but before April 28, when it was reinstated. Lovette's interviews with the drivers were held during that same interval. Accordingly, the Respondents argue, that when Lovette

met individually with the live haul drivers during the first week in April, Company officials had reason to believe that the dismissed representation case involving live haul employees was permanently behind them and that they, again, could deal with their employees.

Lovette explained that in his meetings with the drivers, he merely followed instructions from Solomon, Lankford and Whittington.

During these sessions, Lovette told each of the interviewees that the Company wanted to meet with all the drivers to learn why they thought they needed a union; Holly Farms wanted to correct anything it had been doing wrong. Lovette then asked

each what the Company had been doing wrong.

Lovette recalled that his lengthiest conversation in the series was with Phillips, who long had been with him and was his friend. Phillips complained that neither he nor the other live haul drivers were getting enough worktime to make a living and that, because of low earnings, Phillips had been unable to obtain a loan for a desired house. This shortness of worktime and money also was echoed by others as their principal concern. Lovette explained that live haul drivers had been working the brief 4 day workweeks because of a shortage of live chickens. Lovette committed to the drivers that he would try to get them more time and money by re-

ducing the size of each work crew through attrition. Accordingly, he would not replace department crew members until each of the 36 twelve-member chicken catching crews was down-sized by 1 employee.

Lovette testified that he had told the same things to Parsons as to the other live haul drivers during their interview, but that he could not recall what Parsons had said in return. Lovette denied ever having spoken to Phillips or to any other employee about handbilling. However, Lovette insisted that he did keep his promise to get the drivers more work through attrition and did not replace those who left the Company's employ until about 12 jobs were eliminated. This process, which took until May, then

enabled him, during most weeks, to increase the number of weekly work-days from 4 to 5 for the remaining employees. However, the 5 day work-week never became definite because employees were kept off the job when the slaughter rate was reduced. Nonetheless, as the Company's business had been good during the second half of that year, work hours continued to increase after May.

Except for denying that he had spoken to Phillips or to the other employees about handbilling, Ray Lovette did not dispute the four drivers' descriptions of their interviews with him. While agreeing that he had promised to remedy employee complaints about the inadequate pay resulting from the short 4 day work-

weeks, Lovette did not go into the details of his meetings with the employees. Lovette testified that he had chosen to talk to the drivers rather than the other live haul employees because he believed that they were more interested in the Union and that the Union was more interested in them. I, therefor, credit the essentially uncontradicted accounts of the four drivers as to what Lovette told them during these meetings, including Phillips' testimony, denied by Lovette, that Lovette had informed him that anyone caught distributing literature on Company property would be dismissed. Lovette did not deny having engaged in a variety of other unlawful conduct during these interviews and, as found above, during the

same week when, according to Lovette's testimony, he spoke to the live haul drivers, the Respondents had threatened the arrest of six employees for union handbilling on Company property; had caused the arrest of three of those employees for persisting in such conduct; and had given the three arrested employees written warnings, threatening one with discharge. At the same time, Lankford, in a speech to live haul employees, had mentioned the three arrests while prohibiting union handbilling. Against this background, in crediting Phillips, it appears that Lovette, in telling Phillips that anyone caught union handbilling would be discharged, was merely expressing Company policy.

I also accept the General Counsel's contention that Dimmette, Phillips and Parsons were unlawfully interrogated concerning their union sympathies by Lovette during the above-described meetings.[124] While Dimmette was the most active union supporter of the three in that he posted union literature on bulletin boards, the record does not show that this, or any of his other union activities, had been known to management. Parsons and Phillips, too, had been overt union supporters when they were asked how they felt about the Union. While, as described by Lovette, he and Phillips might have had a cordial, or even a friendly rela-

[124] Rossmore House, 269 NLRB 1166, enfd. 706 F.2d 1006 (C.A. 9, 1985); Sunnyvale Medical Clinic, 277 NLRB 1217, 1218.

tionship, this was not reflected in their interview where Phillips as found above, was warned, in effect, that he and others could be discharged if caught distributing union literature on Company premises.[125] Noting, too, that these interviews were privately conducted in a recognized place of authority, a supervisor's office, I conclude that the Respondents serially violated Section 8(a)(1) of the Act by Lovette's admitted consecutive interrogations during 36 interviews with live haul drivers as to how these employees fell about the Union. While Church, too, was similarly interrogated by

[125] See Harrison Steel Castings Company, 293 NLRB, supra, at 1168; Colorado-Ute Electric Association, Inc., 295 NLRB No. 67, supra, at JD 30.

Lovette in like setting, I find that such conduct was not unlawful since Church previously had been named by the Union in correspondence to the Employer as a member of its in-plant organizing committee. Church also openly had engaged in union activities and his pro-union stance was generally known.

Having credited the employees' accounts of their interviews by Lovette,[126] I find that the Respondents violated Section 8(a)(1) of the Act, respectively, by Lovette's solicitations of and promises to remedy the grievances of Dimmette, Church and other employees, and by actually rem-

[126] Since Lovette was the witness most certain as to when these interviews occurred, I accept his testimony that they took place during the first week of April.

edying these grievances.[127] In agreement with the General Counsel, I further find that the Respondents also violated Section 8(a)(1) of the Act by Lovette's statements to Phillips that a union would not be at Holly Farms, which expressed the futility of supporting the Union; and by Lovette's threat to Phillips to discharge anyone caught union handbilling on Company Premises. Contrary to the General Counsel, I find no evidence that Lovette had said anything to Parsons to the effect that it would be futile for him to support a union.

I am not persuaded by the Respondents' argument that, since the ar-

[127] S. E. Nichols, Inc., 284 NLRB 556, 574-575.

rests of the employees for union handbilling, the threatened arrests, the written warnings, Ray Lovette's interviews with the live haul drivers and other disputed conduct, all had occurred during the period when the representation election petition in Case 11-RC-5583 had been dismissed and not yet reinstated, their conduct during that interval should not be considered in assessing violations of the Act or in support of objections to the later election in that case. This is argued on the ground that since under Goodyear Tire and Rubber Company, supra, as described above, the critical period before an election commenced with the filing of the petition, the absence of an effective petition between that petition's dis-

missal and reinstatement had interrupted that critical period and lulled the Respondents into a good faith belief that the representation question had ended and that they could resume business as usual.

These arguments are unconvincing because Respondents, in any event, should have been restrained. The lawfulness of the Respondents' activities under the Act is not dependent upon whether an election petition has been filed, or remains current, but upon whether the conduct alleged as unlawful in any way coerced, restrained or interfered with employees in the exercise of their rights under Section 7 of the Act. As to whether such disputed conduct, occurring while the petition was in

limbo and subject to restoration, could be considered in support of election objections, that situation is somewhat analogous to that which obtains when an Employer, having won a representation election, acts unlawfully during the period when timely objections to the election still could be filed. In either case, there is an indeterminate procedural hiatus subject to change either, as here, by a motion for reconsideration, or in the analogy, by the filing of objections. In either situation, the Employer acts at its peril. An Employer's unlawful conduct occurring between the time it was successful in the election and when objections were filed has been found to have both violated the Act and to

have served as grounds for setting aside an election.[12]

In the present matter, the Respondents' activities during the interval between dismissal and reinstatement of the election petition merely continued their strong, often unlawfully-conducted, campaign to defeat the Union's organizational drive at their Wilkesboro complex. Such efforts started before the dismissal of that petition and were carried forward after that petition was reinstated. Even the longer workweek Lovette, in April, promised to get the drivers was not delivered until May, after the petition was reinstated. Accordingly, here, too, the Respondents

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[12] See Premier Maintenance, Inc., 282 NLRB 10-11, fn. 4, 16.

acted at their peril and I conclude that unlawful activities found to have occurred during the above hiatus period should be considered in determining whether the Act has been violated and whether the election in Case 11-RC-5583 should be set aside.

(c) By A. Gerald Lankford; Barbara Mathis

Live haul driver Dimmette testified that in late April, at around the 8 a.m. conclusion of their shift, he and a group of about 40 night shift live haul employees were summoned by their supervisors to attend a meeting in the cafeteria annex at Wilkesboro, conducted by then-Holly Farms vice-president for human resources, A. Gerald Lankford. According to Dimmette, Lankford told the employees that if the Union came in

at Holly Farms, and if there was a strike, the Company could haul its chickens to other plants for processing or it could close down the Wilkesboro operation and hire other workers in their place.

Production employee Paula Dowd[129] testified that, in late March, she attended a meeting of about 80 to 100 employees conducted by Lankford in the cafeteria annex of the Wilkesboro fresh poultry plant. Dowd related that she had not paid too much attention to what was said until Lankford, late in the meeting, told the group that the Company would relocate the plant to Virginia or Texas if it did not meet the Union's demands. While

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[129] See Premier Maintenance, Inc., 282 NLRB 10-11, fn. 4, 16.

Lankford principally read his statement to the employees from a prepared text, Dowd does not recall with certainty whether he read the above declaration or delivered it extemporaneously.[130]

Live haul driver James Phillip Church related that in late June, he and 15 to 20 other live haul depart-

[130] Dowd also testified without contradiction that, on April 3, she was approached by a Respondents' security guard while walking to her car after leaving work, while holding some union authorization cards in her hand for distribution. The guard told Dowd that she need not have those (cards) on Company premises. She said okay. The guard told Dowd that if she did not believe him, some of the truckers had been arrested earlier. Dowd repeated okay and left. Noting that the guard's admonition to Dowd was consistent with the Respondents' policy, manifested that same day, of using the security guards to threaten and to assist in the arrests of employees for distributing union literature in Company parking lots during non-work time, I find that when the guard spoke to Dowd, he was acting as a Respondents' agent. Hudson Oxygen Therapy Sales Company, 264 NLRB 61, 70-71. I further find that the Respondents violated Section 8(a)(1) of the Act by the guard's implied threat that Dowd, too, might be arrested if she gave out the cards on the Respondents' property.

ment employees—chicken catchers and live haul drivers—were at a meeting presided over by Lankford and attended by Barbara Mathis, personnel manager of Holly Farms' Wilkesboro complex. Church testified that Lankford opened the session by asking if the employees had any questions about the coming Tyson buy-out of Holly Farms. One employee asked about Tyson's insurance coverage. During the meeting, Lankford asked if there were any rumors about the Union. Church testified that when no one responded, Mathis interjected that, "If the Union wins the election, we'll know who you are and who voted because we'll see the cards. But if the Company wins, we'll hear no more about it," ending the meeting. However,

earlier during that session, Lankford also had told the employees, "No more handbilling. The Company had had three previous arrests and did not need any more."

Lankford testified that from late March to July, he met with various groups of Company employees during which he read a series of prepared speeches directed at the Union's campaign. The speech, dated April 12, heard by Dimmette and other live haul workers, contained the following language relevant to Lankford's explanation to the employees why the Union could not force the Company to do anything by calling a strike:

> There are good reasons why this is so. For example, we don't think it would ever come to that, but we have the numbers to show that we could close

> down every operation we have in Wilkes County, North Carolina, and continue to meet all our customer obligations. I'm not suggesting that we would voluntarily close down any operation in Wilkes County or any where else, but if these operations could be closed by a strike, we could sit that out indefinitely if we had to.

Lankford related that Dowd and others had heard him read an address dated March 29, delivered to groups of the Company's food service and roast chicken plant employees during a series of meetings in the cafeteria annex of the Wilkesboro fresh poultry plant. These groups which ranged in size from 75 to 200 employees, did not include live haul unit employees. In this speech, belittling the impact of any possible strike in the event of unionization, Lankford read the

following germane to what Dowd recalled as having heard.

> A determination also has been made that all of the poultry killed and processed in the Wilkesboro plant can easily be killed and processed in our other plants in Virginia, North Carolina and Texas. We would not lose <u>any</u> production to speak of even if we could not operate the Wilkesboro plant.
>
> As far as this plant right here is concerned, our Texas quick-to-fix plant is ready and able on a moment's notice to take over this production responsibility.
>
> I am simply telling it like it is.

In describing what might happen in the event of a Union-called work stoppage, Lankford then indicated that the Company would move its production processes from Wilkesboro to its other facilities in Virginia and

Texas. No questions were asked by employees during any of the meetings where this address was given. Lankford also denied having added anything beyond what was written and described above.

Lankford also gave a different prepared address to live production employees and to employees at the feed mill, bulk feed, and to non-live production employees at the Roaring River Service Center on June 29 and 30—which was heard by Church and others. While the text of this address describes an employer's right to replace economic strikers, should such a stoppage occur, the written text of the speech does not refer to handbilling or to the arrest of employees for doing so on Company prop-

erty and Lankford denied that arrests for handbilling or related consequences were mentioned during any question or answer session. Lankford also recalled that Mathis had attended most of the June meetings, when that last speech was given and that he was certain that Mathis had not stated that the Company would know how the employees had voted.

I accept Lankford's testimony that personnel manager Mathis did not make her above statement that the Company would know the way employees had voted if the Union should be selected at one of his meetings since live haul manager Ray Lovette testified that she made such a statement, not at a session conducted by Lankford, but during a talk to employees given

by Skipper Solomon. In this regard, Ray Lovette testified that he and Mathis were present at a June meeting of employees conducted by Everett (Skipper) Solomon, then-vice-president for Holly Farms' North Carolina operations. According to Lovette, Mathis had attended all such meetings held by Solomon, but had said nothing except to answer questions directed to her. However, at a June meeting, before the representation election, an employee asked if anyone would know how the employees had voted. Solomon replied that no one would know, but Mathis interjected that the Company would know, when the Union sent in their requests for dues checkoffs. Mathis complied with Lovette's signal to hush. Since Lov-

ette's testimony concerning Mathis substantially corroborated that of Church, and, noting that Mathis did not attempt to deny this incident although called to the stand by the Respondents more than once. I find that that the Respondents violated Section 8(a)(1) of the Act by Mathis' above statement which threatened employees with unspecified reprisals if they supported the Union and which threatened employees that their vote, if for the Union, would be known to the Respondents' management.[131]

While Ray Lovette also corroborated Lankford's testimony that he had not deviated from the written text of his speech and, therefor, did

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[131] S. E. Nichols, Inc., 284 NLRB 556, 577.

not tell the employees, in effect, that there would be no more handbilling, that three employees had been arrested for union handbilling on Company property and that the Company did not need any more arrests, I, nonetheless, credit Church's testimony that Lankford did make the statement to the above effect. Lankford, by his own testimony, that same week had been the principal force behind those arrests and the threatened arrests. Having taken that much trouble, it would have been quite consistent for Lankford to have tried to maximize the effects of those efforts by making additional employees aware of hazards of engaging in that type of union activity on Company property.

I, therefor, find that the Respondents violated Section 8(a)(1) of the Act by Lankford's above statement to employees which, impliedly, threatened employees with arrest if they engaged in union handbilling on Company property in breach of the Respondent's unlawfully broad no access/no distribution rule.

As to the prepared text of Lankford's March 29 speech described above, his remarks, in a different, less coercive atmosphere, might not have been violative of the Act since it is not necessarily unlawful for an Employer's representative, during a union campaign, to tell employees that, if the Union is selected and calls a strike to support its bargaining demands, the Employer could

continue to operate by relocating the struck operations to its other facilities, or by replacing its striking employees.[132] Since Lankford, in his talks, did not tell employees that relocation from Wilkesboro would be voluntary or inevitable but merely had announced, in effect, that, should a strike occur, relocation was a possibility and that the Company could sit out a strike indefinitely, I conclude that Lankford's references to a strike and its consequences, in other circumstances, could be construed as predictions of the possible occurrence of events outside the Company's control and not threats of of

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[132] Baton Rouge General Hospital, 283 NLRB 192, 210; The Salvation Army Williams Memorial Residence, 293 NLRB, supra, at 955, 963.

reprisal based on the Employer's own volition. However, Lankford's words, in the present case, when viewed against the background of the Respondents' other unlawful conduct found herein, including Lankford's own activities, had a tendency to coerce employees. I, therefor, find that the Respondents violated Section 8 (a)(1) of the Act by his March 29 speech threatening employees with relocation of their work and attendant loss of their jobs if they selected the Union.[133]

[133] Harrison Steel Castings Company, 293 NLRB, supra, at 1159. As the disclaimer of intent to voluntarily relocate, contained in his April 12 speech, made that address less menacing and not the threat of relocation less patent, I find that Lankford did not violate the Act by that address.

(d) By Samuel S. Whittington

Live haul driver James Phillip Church testified that on about April 28, he was summoned to meet with live production manager Samuel S. Whittington and live haul manager Ray Lovette. Whittington accused Church of harassing a couple of employees. Church denied having done so and asked for the names of the complaining employees, which Whittington declined to provide. Church, maintaining his innocence, also refused to comply with Lovette's request that he sign a personnel change of status (warning) form containing the following reason for the discipline:

> It has been brought to my attention by other employees that you have been harassing them here at work.

> This is to inform you and warn you that we will not allow you to harass other employees on any subject. If it happens again you will be terminated.

Although Church persisted in his refusal to sign the above warning, it finally was signed by Whittington as department head and by Lovette as a supervisor. Church testified that Whittington told him during that interview, after he had refused to sign the warning, that the Company would forget about it that time, but that if such conduct ever came to Whittington's attention again, Church would be terminated.

Church further testified that, during that meeting, Church told Whittington that he had been handbilling employees. Whittington re-

plied that Church could be fired for union activities.

Ray Lovette testified that the employees assertedly harassed by Church were two other live haul drivers, Eddie Dean Brown and Johnny Huffman, whom Lovette described as anti-union. While Lovette, on April 27, was in the superintendent's office while others also were present, Eddie Brown had come in and announced that he had been harassed. Lovette testified that he waited until Brown was alone and asked what had happened. Brown reported that "they" had threatened to beat the hell out of him, identifying "they" as Church and three others.[134] Brown told Lovette that

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[134] Brown, Huffman and Church all reported to Lovette through their supervisors.

(continued...)

these individuals had threatened him at the plant and had called him at home, telling him that he should quit "bringing [the Company] any information." If he continued, they were going to beat the hell out of him. Brown also related to Lovette that Church had threatened him in the break area about 2 days before.

At around the same time, Johnny Huffman, who had been away from work for 3 days, sent word to Lovette by Huffman's son, also employed at Holly Farms, that "they" had told him not to come to work. Huffman identified Phillip Church as one of these offenders. When Huffman returned to

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[134](...continued)
According to Lovette, although he asked them to do so, Brown and Huffman would name only Church, but not the others described as having menaced them.

work after his absence, he sent a message to Lovette, again through his son, that Lovette should not speak to him.

Accordingly, Lovette stayed away from Huffman for 1 to 2 days after his return and then spoke to Huffman in private. Huffman volunteered to Lovette that he was opposed to the Union and had been suggesting to employees in the break area that they withdraw their support for the Union. He told Lovette that Church and the others had threatened him and had threatened to harm his wife, also employed by Holly Farms. He was afraid for himself and to have his wife drive to work. This had caused Huffman to change his schedule by having Eddie Brown drive his car home while

Huffman waited at the plant until his wife's shift ended. They then drove home in her car.

There is a conflict between Lovette's testimony and that of Whittington as to what Lovette told Whittington when, on April 27, Lovette relayed these asserted complaints to Whittington as his immediate supervisor. Lovette testified that he had passed on to Whittington Huffman's account that Church and three others had threatened to beat the hell out of him and that he was afraid to come to work and to talk to Lovette. Lovette informed Whittington that Eddie Brown also had told him that Church and three others had threatened to beat him up and that he, too, was afraid. Both men had been threatened

at work and over the telephone. Except for identifying Church, neither Huffman nor Brown would say who the others were who had threatened them.

Whittington, however, described Lovette's April 27 report to him in less dramatic terms. Whittington testified that when Lovette had come to his office, he merely stated that two live haul employees, Eddie and Johnny, had come to him on separate occasions to complain that Phillip Church had been harassing them for not supporting the Union and had told them that it would be in their interest to switch sides and to stop supporting the Company. These men did not feel that they should have to contend with this. Whittington asked if these employees would be willing

to relate again what had taken place. When Lovette said that they would, Whittington told Lovette to have Church come to his office. Whittington testified that, until Lovette had told him of Huffman's activities, he had not know that Huffman had been going around the plant attempting to encourage employees to support the Union. Whittington's testimony, contrary to Lovette, that he, in effect, was told that Church had harassed the two men rather than threatened violence is reflected in the language of the warning he gave to Church which merely refers generally to harassment.

Lovette, essentially corroborated by Whittington, testified that Whittington began the April 28 meeting by

repeating to Church what Lovette had told him about Church's having harassed the two unnamed employees. When Church denied the charges, Whittington told him that he was going to write him up on a warning slip and that, if this happened again, Church would be discharged. Church, however, refused to sign the warning form, as requested, and asked who the two employees were. Whittington replied that he was not going to tell him. As Church left, he said he knew who they were—that damned Eddie and Johnny. Nothing was said to Church during that meeting about handbilling or other union activities in which Church might have been engaged. Since that warning, Church, whom Whittington described as a satisfac-

tory worker, has not received any further discipline.

Lovette, however, became inconsistent on cross-examination. When Lovette assertedly first reported Church's asserted harassment of Huffman and Brown to Whittington, Huffman had not yet stayed home from work for the 3 days and was not yet aware that this wife had been threatened. Lovette also never learned whether Church had played any role in threatening Mrs. Huffman and it was only after, not before, he had spoken to Whittington on April 27 that Lovette had learned that two individuals besides Church had threatened Brown. Whittington, before issuing the warning to Church on April 28, had not personally investigated the com-

plaints of Brown and Huffman but had relied completely on what was said to him by Lovette. In addition, Eddie Dean Brown, called as a witness by the General Counsel, testified that when, in late April or early May, Lovette had asked him if Phillip Church had been harassing him, he had said no, ending the conversation.

Noting the inconsistencies between Lovette and Whittington as to what Lovette had reported about Church on April 27; that Lovette's testimony as to what he, personally, had been aware of concerning Church's conduct when he reported to Whittington was self-contradictory; that some of what Lovette originally was to have charged Church with having done on April 27 well could not have been

known to him by that date; and that Eddie Brown, an alleged harassment target, had directly contradicted Lovette's testimony, I credit Church's account of his April 28 meeting with Whittington and Lovette and conclude that the Respondents violated Section 8(a)(1) of the Act by orally threatening Church with the loss of his job if he continued his union handbilling. I further find that the written warning, also threatening discharge, was discriminatorily issued to Church because of his union activities, in violation of Section 8(a)(1) and (3) of the Act. In so concluding, I find no credible evidence that Church had harassed other employees to coerce them to stop working against the Union.

(e) Union insignia

Michael Sturgill, a live haul employee who had been with Holly Farms for about 4 years, testified that, while seeking regular assignment as a live haul driver, in mid-July[135] he wore at work a hat with the union insignia on it. About 10 minutes after he finished his shift, certain supervisors told him that they wanted to look at the hat and he laid it down on a vending machine. Ray Lovette called to Sturgill that if he was going to wear the hat, he should get it and get out the door. Sturgill picked up his hat and left.

Sturgill further testified that when he finished work on the next day

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[135] As noted, the representation election for the live haul unit was held on July 27.

David Minton, a superintendent in the live haul department, told him that he had jeopardized his career by wearing that hat. Sturgill was not wearing a union hat when Minton spoke to him.

Sturgill explained that when these incidents occurred, he basically worked as a chicken catcher, while aspiring to a permanent assignment as a live haul driver. At the time, he also filled in for absent live haul drivers, while waiting for a vacancy to develop. By the time of the hearing, Sturgill had become a live haul driver.

Sturgill agreed with Lovette's testimony that, from April through July, many Teamsters hats were passed out and, as Tyson caps also were

available, many employees wore one or the other. Both were baseball-type caps.

Lovette recalled that in late June, he did speak to Sturgill in the break area. While the shifts were changing, Lovette saw Sturgill wearing a baseball cap, standing with some other individuals near the water cooler. Sturgill, as Lovette approached, pulled off the cap and stuck in his shirt. Lovette related that he had told Sturgill that if he was going to wear that Teamsters cap, he should have enough guts to keep it on and not to jerk it off and hide it in his shirt when he saw Lovette coming. Neither said anything else. Lovette denied having told Sturgill or any other employee that if he was

going to wear the Teamsters cap to get it on and to get out of the door. Lovette explained that what he, in effect, had told Sturgill was that he did not have to hide his union hat. Lovette had not been aware of Sturgill's affinity for the Union and, as noted, many employees had been wearing union caps when he spoke to Sturgill.

Minton denied that he had spoken to Sturgill about his wearing a union cap, although he occasionally had seen Sturgill do so, and specifically denied ever having told Sturgill that wearing the union cap could affect his driving career, or words to that effect. Minton related that when the above incident was to have occurred, at the end of Sturgill's shift, there

was little overlap between his schedule and Sturgill's because they worked different hours.

It is not necessary to precisely resolve the details of any evidentiary conflict between what Lovette had said to Sturgill about his wearing a union hat because Lovette's own account of that incident indicated at least as much hostility as was described by Sturgill. A chilling effect on Sturgill would have resulted in either case. Contrary to Lovette's assessment, his statement to Sturgill, in the presence of others, that he should have the guts to keep the union hat on and not to pull it off and hide it when he saw Lovette coming, was no bland reassurance to Sturgill of his right to wear such a

hat, but was a strong expression of displeasure by the head of the department in which Sturgill then was seeking a better job, and was tantamount to prohibition. The harshness of Lovette's rebuke, even as he described it, was illustrated by his having publicly questioned Sturgill's courage. Either Sturgill's version or that of Lovette would have the inhibiting affect asserted by the General Counsel.

In the hostile anti-union atmosphere that existed, I credit Sturgill's further testimony concerning his encounter with Minton, who, as a live haul superintendent, reported directly to Lovette and which furthered Lovette's purpose. In so doing, I note that Sturgill's credi-

bility is enhanced by the risk taken in testifying against the Respondents' interest while he still was employed by them.[136]

In finding that the two incidents violated the Act, I note that while other employees also then wore union caps on the Respondents' premises, Sturgill's situation at the time was particularly sensitive because he then was hoping to receive an appointment as a regular live haul driver. In this, he was vulnerable to the pressures described because the chicken catching work which Sturgill then was seeking to escape was difficult and unpleasant. As described, this assignment involved go-

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[136] See Rodeway Inn of Las Vegas, 252 NLRB 344, 346; Gold Standard Enterprises, Inc., 234 NLRB 618, 619.

ing to the farms where the chickens were raised where, under cover of darkness, he and the other chicken catchers would continuously catch chickens with their hands and cage them during shifts of indeterminate duration, which continued until the task was completed. The live haul drivers, whose ranks Sturgill then hoped to join, did not themselves catch chickens but merely operated the vehicles that transported the crews, the caged chickens and any other relevant equipment. While, arguably, the quality of Sturgill's life could have been materially improved by advancement from chicken catcher to live haul driver, it is unlikely that he could have received

such a position over Lovette's objection.

The Board has held that when an Employer restricts its employees' right to wear union insignia at work, it is the Employer's burden to establish that special circumstances exist which make the rule necessary, such as in order to maintain production or to ensure safety.[137] Here, both incidents occurred after Sturgill had finished work and the Respondents have made no such showing.

Accordingly, I find that the Respondents violated Section 8(a)(1) of the Act, respectively, by Lovette's admitted conduct which effectively prohibited the wearing of union in-

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[137] The Kroger Co., et al., 284 NLRB 663, 684.

signia, and by Minton's threat of retaliation for wearing such insignia.[138]

(f) By Dean Grimes

Live haul employee Clyde Lunsford[139] testified that on July 24, 3 days before the representation election, he was operating a forklift at one of the chicken farms when his supervisor, Dean Grimes, mounted the side of his forklift and told Lunsford that (live haul driver) Phillip Church probably would be fired if the Union did not get in.

Grimes, in turn, did not recall having spoken to Lunsford about the

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[138] Pak-More Manufacturing Company, 241 NLRB 801, 803.

[139] Lunsford, who intermittently has worked for Holly Farms for about 25 years, basically running a loader, still was employed by the Respondents at the time of the hearing.

Union in 1989, and, although he regularly got into Lunsford's loader to tell him what he wanted done, Grimes denied having told Lunsford that Church would be fired if the Union did not get in.

While, again, in a one-on-one situation, the credibility issues are not free from doubt, particularly where the alleged incident involves a supervisor who was not party to any other alleged unlawful conduct, I, nonetheless, credit Lunsford. In so doing, I note that Lunsford was a longtime employee of the Respondents who, when he testified, was still in the Respondent's employ under Grimes' supervision. I, therefor, find that Lunsford's credibility was enhanced by his willingness to jeopardize his

economic interest to testify against his employer.[140] I further note that Phillip Church's pro-union activities were well known to management, including to Grimes, and that Church had been the target of other Respondents' unfair labor practices, including coercive interrogation, threats and an unlawful written warning. It also has been found above that Ray Lovette, in April, had unlawfully solicited grievances from Church, which, as promised, he had remedied.

For the above reasons, including that Grimes' threat described by Lunsford as consistent with the Respondents' pattern of union animus

[140] Rodeway Inn of Las Vegas, supra; Gold Standard Enterprises, Inc., et al., supra.

directed, in good part, against Phillip Church, I conclude that the Respondents violated Section 8(a)(1) of the Act by Grimes' statement to Lunsford to the effect that Church would lose his job if the employees did not select the Union.

(g) Raymond (Bob) Johnson

Packing department employee Geneva Moore Tilley, employed in the Wilkesboro main plant's fresh processing operation, testified that, on November 9, she and another employee, Phyllis Roberts, were handbilling for the Union outside the Respondent's Convenience Foods facility,[141] located just across a Company street from the main processing plant. From

[141] Convenience Foods, a colloquialism for the Tyson Food Service plant, prepares frozen and fast foods for institutional use.

where they stood on the parking lot sidewalk, about 20 to 25 feet from a stairway leading to a platformed entryway, Tilley saw supervisor Raymond (Bob) Johnson[142] standing on that platform with three other unidentified men. Tilley heard Johnson say to one of the men, "Well, here comes the Teamsters Union again, handbilling." Tilley related that she looked at Johnson but continued to pass out handbills. Johnson then told the man, "Yes, sir, here they are again for Teamsters Union 391. They should all be fired. If I were to catch any of my employees handbilling or even talking about the Teamsters Union, I

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[142] Johnson, a Convenience Foods supervisor, had held his position for about 3 years at the time of the hearing.

would fire them or see to it that they would get fired."

Tilley asked if Phyllis Roberts had heard what Johnson had said, but Roberts replied that she had not, having then been talking to one of the employees. The two women then left the area.

Tilley previously had not known Johnson, learning his name only later, but recognized him as a supervisor and the other men as Convenience Foods employees by their respective uniforms. Holly Farms' supervisors, as did Johnson, wore white jackets and navy blue trousers.

Johnson denied both knowing Tilley and having made the anti-Teamsters remarks threatening discharge attributed to him by Tilley. Johnson knew

Wilma Wagner and Phyllis Roberts, employees who, he related, more frequently had given out union literature near the foot of the platform where he had stood. An entrance atop the platform opened to the Convenience Foods plant where he worked. Johnson explained that his duties required that he be on the platform each day. After he and another supervisor punched out the timecards for some 100 employees at the end of their shift—at around 3:15 p.m.—he was responsible for checking the break room, the bathroom areas and the plant exterior to ensure that there was no interruption in the flow of traffic and that those areas were clean. Accordingly, barring special circumstances, Johnson was on that

platform almost every afternoon at that time to check the outside areas and, also, to talk to his people as they left to hear their problems and answer their questions. Normally, one to three other men would join him there. These were employees who either were leaving and waiting for a ride, or who had arrived early for work.

Johnson recalled that when Wagner and Roberts first began to give out union literature near the platform stairs, Roberts had told him that he should go back inside because he was intimidating the people who were coming by and, in effect, was interfering with her distributions. Johnson replied that he did not feel that he was doing the intimidating; she was

the one who was acting differently by being out there, because he was there every day. Roberts, according to Johnson, in so commenting did not refer to anything Johnson had said to any employee. He reiterated his denial of having made the statements described by Tilley.

The general evidence surrounding this incident does not support Tilley's account. Roberts who, according to Johnson's uncontroverted testimony in this area, handbilled regularly in his presence, had not been menaced by Johnson or, at least, did not testify to that affect, and Tilley, at a distance of 20 to 25 feet from Johnson when this incident was to have occurred, might well have been out of hearing range. This is

particularly true if, as described, she had been busy handing out union literature at the time. In evaluating the conflicting testimony, I note Johnson's candor in taking the initiative to testify that Roberts had accused him of intimidating employees who might pass receive literature and that he had declined her request to avoid this by going back inside. In such circumstances, however, Johnson's mere observation of employees' handbilling on Company premises, without more, would not constitute unlawful surveillance. The Board has held that "[u]nion representatives and employees who choose to engage in their union activities at the Employer's premises should have no cause to

complain that management observes them."[143] Noting that neither Johnson nor Tilley knew each other on the day in question; that Roberts, apparently, often had joined in handbilling at that location in Johnson's presence without unlawful incident; that Roberts did not corroborate Tilley; and that Johnson was not involved in any other form of unlawful conduct in this proceeding, I find that the weight of the evidence does not support Tilley's account and, therefor, it is concluded that Johnson did not make the unlawful statements attributed to him. In so finding, I note that while Tilley's testimony like that of certain other

[143] Porta Systems Corporation, 238 NLRB 192, fn. 4, and cases cited therein. Also see Southwire Company, 277 NLRB 377, 378.

witnesses, was deserving of greater respect by virtue of her continued employment by the Respondents at the time of the hearing and, accordingly, had testified against her own pecuniary interest,[144] this was but one of several credibility factors, which, in my view, did not overcome other considerations indicating that the Act had not been violated.

(h) Removal of pro-union literature from Company bulletin boards

Live haul driver Dennis Dimmette testified that the Company allowed its employees to post notices on the several bulletin boards in the live haul department and that he had been among those who had exercised that privilege. Dimmette related that on

[144] Rodeway Inn of Las Vegas, supra; Gold Standard Enterprises, Inc., et al.

several occasions between March and July, while the representation election petition for the live haul unit was pending, he posted union notices on those bulletin boards. While such notices might have been permitted to stay up all night, they somehow were removed by the time the first shift workers arrived at around 7 or 8 a.m. Although Dimmette never saw anyone take them down, the notices he posted never remained up for more than a day. On the other hand, other posted notices, such as those relating to items for sale or miscellaneous announcements unrelated to the Union were left alone. In view of Dimmette's testimony describing repeated removal of notices posted by him, the burden passed to the Respondents, who

controlled the bulletin boards to enter a denial or an explanation, which they did not do.

From Dimmette's uncontroverted testimony, I find that the Respondents violated Section 8(a)(1) of the Act by discriminatorily excluding pro-union literature from their live haul department bulletin boards before the election while, at the same time, leaving undisturbed other posted notices not germane to the Union.[145]

(i) Unilateral changes in absenteeism and pension policies—facts

Dimmette testified, also without contradiction that, on October 1, the Respondents unilaterally changed the existing policy requirement as to

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[145] Marathon Le Tourneau Company, Longview Division, 256 NLRB 350, 357-358.

when absent live haul employees must call the Company to report their status.[146] On October 1, this policy was changed to require that any employee who was absent for 2 days must call in or be terminated. Before this change, live haul employees had been required to call the Respondents only after they were absent for 3 days.

Dimmette further testified that, during the second week of December, he received a letter from the Respondents, which he did not retain. He related that this letter had announced that the Holly Farms retirement plan would be terminated in September 1991 when it would be paid out. Dimmette does not recall who signed that letter.

[146] Unlike most other above alleged violations of Section 8(a)(1) of the Act, this incident, which occurred on or after October 1, relates to the period after Tyson assumed control of Holly Farms.

In mid-January 1990, however, Dimmette attended a meeting conducted by personnel manager Barbara Mathis where the pension plan was discussed. Also present were Ray Lovette, Jerry Tilton of personnel and all the night shift live haul supervisors and employees. Mathis gave the employees the status of the retirement plan, explaining how much money was in the plan and announced that in September 1991, the plan would be terminated and the employees paid off. This was followed by a question and answer session. As Dimmette recalled, no questions were asked about the

changes in retirement, but some were raised about other matters.

Lankford, on the matter of retirement policies, testified that when he had given his April 12 speech to groups of live haul employees, he answered employee questions. With respect to an employee inquiry as to what would happen to the pension plan in the event of a takeover of the type discussed in that address, Lankford had told the employees there, and at other meetings where that speech was read, that the pension plan was something that the employees owned which nobody could take away from them. If the Company was sold, the employees' vested interest in the plan was theirs and could not be taken away whether the Company was

sold to Tyson or Conagra[147]—no matter what happened to Holly Farms.

Lankford also told the employees at those sessions that if Tyson bought Holly Farms, there was a good chance that Tyson would terminate the Holly Farms pension plan and put in their own plan, different from that of Holly Farms. On the other hand, if Conagra won the bidding process, there was a good chance that the Company would leave the Holly Farms pension plan in place exactly as it then was.

Since the alleged unilateral changes concerning absenteeism and pensions relate to bargaining and took place after Tyson became the

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[147] Conagra, Inc., a large food company, had been Tyson's principal rival in its efforts to acquire Holly Farms.

Respondents' principal, these issues will be considered below in the discussion of the bargaining relationship between Tyson and the Union.

3. The alleged Section 8(a)(3) violations

(a)(i) The discharges of four plant employees—parties' position

The General Counsel and Union contend that in March and April, Holly Farms terminated four of its plant workers, Alvin Bouchelle, Patricia Barker, Raymond K. Huffman, Jr., and Joe Richardson, because of their union activities. These parties argue that the Respondents' position that Bouchelle, Barker, and Huffman were discharged because they had violated the Company's rule against soliciting in work areas during working times was pretextual because sales

and other solicitations in work areas during work times long had been rampant throughout the Respondents' plants. Only Bouchelle, Barker and Huffman, as union activists, had been singled out for discharge.

The Respondents concede that Richardson was terminated for his union activities, but argue that such action was justified and that Richardson was unprotected by the Act because he then was a supervisor within the statutory definition. The General Counsel and Union deny Richardson's asserted supervisory status.

(ii) The discharge of Alvin Bouchelle—facts

Bouchelle[148] testified that on March 31, as he arrived for work, his department head, plant engineer Marion McKinley (AL) Bare, summoned him to the office of Robert Pipes, second shift plant superintendent. Bouchelle met there with Pipes, Bare, and David Fairchild, the plant manager. Bare asked if Bouchelle had been involved in any union activity. Bouchelle told him yes, that he had been soliciting signatures for union cards in the upstairs non-work area. Bare told Bouchelle that he had an eyewitness who had stated that Bouchelle had passed out union cards down-

[148] Bouchelle had been employed by Holly Farms as a maintenance employee in the Wilkesboro food service plant since May 19, 1986.

stairs, which Bouchelle denied.[149] Bare continued that Bouchelle had been charged with a serious violation of Company policy and that he had no choice but to terminate him. Bouchelle was not told in the course of that interview the names of any employees with whom he was to have interfered. Bouchelle did not reply and was escorted from the plant.

The Company's personnel change of status (discharge) form, dated March 31, signed by Al Bare, as department head, and Dan Spears, as supervisor, set forth the following explanation for the discharge:

[149] The food service plant was a two-story building with production facilities located on the first floor and, a break room, dry storage, offices and the quality control laboratory on the second floor. The first floor generally was considered a work area where the Respondents contend that solicitation was prohibited.

> Alvin has been disrupting employees from doing there [sic] job by soliciting union membership while down in the plant on the job.

Another item on this form, as to whether the signatory supervisors would rehire this employee, was checked "no" because of Bouchelle's disregard for Company policy. However, the supervisors wrote that they would consider rehiring Bouchelle under certain conditions in the future, "if we get assurance that he understands and will abide by company policy."

Bouchelle testified that he had solicited many employees to sign authorization cards during the Union's campaign. Most were approached in the upstairs break and non-work areas, and while they were entering

the plant. He also had solicited four or five employees to sign authorization cards downstairs in the work area, during worktime, but not while they actually were working. Such employees, when solicited downstairs, were in the hallways, in the maintenance shop, or in production areas while the lines were down. Bouchelle testified that most of the people he spoke to initially had asked him for the union cards, but not while he was at work.

Bouchelle's maintenance duties required that he move about the plant. While his main job was to maintain the fry lines where chicken was cooked, his work, which included welding and all types of repairs, took him all over.

Bouchelle testified, as did other employees, that there long had been solicitation by supervisors and employees in all plant areas. Products such as girl scout cookies, Avon products, raffle tickets and tickets for community events were regularly sold. He related that on several occasions after he had begun work on his second shift, first shift employees still in the plant asked him to buy raffle tickets.[150] Bouchelle related that, while supervisors were in the area during working time and in the work place, he had purchased raffle tickets from employee Tony Miller, another named employee and from

[150] The second shift, to which Bouchelle had been assigned, with some fluctuation, worked from between 3 to 3:30 p.m. until 12 to 12:30 a.m. Sometimes the shift continued until 1 a.m.

several other employees at unrecalled dates. So extensive were these sales that Bouchelle had not known there were restrictions on solicitations or on the distribution of literature. No supervisor ever had told him not to buy a raffle ticket in the work area.

Lankford denied having known of any breaches of Company policy, including described sales by a supervisor of Christmas ornaments and poker games. He explained that such sales and poker games during worktime were against the rules but that it was not contrary to Company policy to sell items in the bathroom. Sales of raffle tickets or other work items would be appropriate as long as such sales did not interfere with work.

Quality control employee Tony Miller, called by the Respondents, testified that, in November 1987, he had sold Bouchelle raffle tickets sponsored by a volunteer fire department of which Miller was a member. This transaction occurred by the sink in the front area of the plant while Miller, a first shift employee, was leaving work and Bouchelle was arriving for work on the second shift.

Miller related that he has sold raffle tickets only in the break room and to employees in hallways coming from or going to the break room. He did sell Bouchelle raffle tickets on one or two earlier occasions but does not recall having sold them to him at any place but at the sink. Miller also has sold raffle tickets to em-

ployees when they came to work in the second floor quality control laboratory area, where he kept supplies. Miller's supervisor, David Taylor, also has purchased a raffle ticket from him in that laboratory. Miller never was reprimanded or disciplined for selling raffle tickets in the laboratory.

Bobby Ray Garris, identified by Bouchelle as a supervisor[151] who might have seen him buy raffle tickets in the work area, denied that he had observed any employee selling or buying items in the work area. Garris also did not participate in sports pools.

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[151] Garris, a former fry line supervisor, had been a rank-and-file employee since September, after Bouchelle's discharge.

Bare testified that as plant engineer at the food service plant, Wilkesboro, he was responsible for the plant, mechanically and structurally. Bare was assisted by a maintenance crew.

In March, Bouchelle was a maintenance lineman who took care of fried chicken lines 1, 2 and 3 and, if called, also took care of line 4. Lines 1, 2 and 3 occupied areas of about 100 feet in length and the four lines together occupied slightly less than 25 percent of the overall plant area.

Bare testified that, during a conversation with plant manager David Fairchild; Joe Griffin, then vice-president of production; and Robert Pipes, second shift superintendent,

one of the foregoing had told Bare that employee Ray Hunt had reported through a supervisory chain of command reaching to Pipes, that on March 29 Bouchelle had aggravated Hunt by trying to get him to sign a union card. Bare asked where this had taken place and was told that it had occurred in the hall in front of the maintenance shop.[152] Bare asked what they were supposed to do about Bouchelle. Griffin replied that Bouchelle should be terminated if he had been doing this and told Bare to call

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[152] Bare testified that at a meeting held sometime before March 31, supervisors had been notified that plant personnel were to be advised that they could engage in union activities in the upstairs break area and in the outside areas. Bare did not testify as to whether this information was subsequently conveyed to the employees.

in Bouchelle to talk to him and to get his side of the story.[153]

That afternoon, Bare called Bouchelle to Pipes' office where he met with Bouchelle and Pipes.

When Bouchelle entered, Bare asked if Bouchelle had been handing out union literature and cards in the plant during work hours; bothering employees while they were working. When Bouchelle asked where, Bare replied around the maintenance shop.

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[153] As related to Bare by either Griffin or Fairchild, Hunt had been on his way from one job to another when Bouchelle stopped him and asked him to sign a union card in an area between the offices and line 4. When Hunt replied that he did not want to sign a union card and that Bouchelle should let him alone, Bouchelle reportedly had told Hunt to take one anyway, to read it over and to think about it. Since Bare did not conduct any investigation by speaking to Hunt or to any of the supervisors who had passed along his complaint before acting against Bouchelle on this information, he did not know whether Hunt had been on break or in an assigned work area when Bouchelle approached him.

Bouchelle answered that he had only given Ricky Prevette, a third shift maintenance employee, some papers. Bare told Bouchelle that he had been told that Bouchelle had handed out things besides that outside of the maintenance shop. Bouchelle did not answer. Bare told Bouchelle that he was asking him to either quit or be dismissed. Bouchelle told Bare that he did not believe this was occurring "just for that." Bare stated that, as Bouchelle knew, he had been told just the other day that he was not supposed to be doing such things during work hours and in the work areas. A place had been provided for such purpose.[154]

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[154] Fairchild testified, contrary to Bouchelle, that he had not been present at Bou-
(continued...)

According to Bare, Bouchelle replied that he did not think Bare should fire him for this. Bare answered that if Bouchelle did not like what the Company was going to do, he could take it to the Labor Board; Bare thought that the Company's actions were right. Bare accompanied Bouchelle to the maintenance shop where Bouchelle turned in his tools and gathered his personal belongings. Bare helped carry his stuff. When they got to the guard house, Bouchelle told Bare that he was the best boss that he ever had; that this had been the best job he ever had; and asked Bare for a job recommendation,

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[154](...continued)
chelle's terminal interview because away on vacation. He had learned of and approved the discharge after receiving Bare's report upon his return.

which Bare readily agreed to provide. He had considered Bouchelle to be a good employee.[155]

(iii) Prohibition on discussing pay rates with other employees—affecting Bouchelle —facts and conclusions

The General Counsel further contends that the Respondents had violated Section 8(a)(1) of the Act by Fairchild's admonitions to Bouchelle about 1 week before his discharge that it was against Company policy for him to discuss his wages with

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[155] Bare testified that he, too, had seen raffle tickets and other community type organization tickets, such as those sponsored by the Rotary Club, sold in the plant and, before 1989, had seen girl scout cookies sold in the hallway to individuals who were going to or from the break room. In 1988, he had seen employee Tony Miller sell raffle tickets in the first floor hallway at the foot of steps descending from the second floor break room. Bare had not spoken to Miller at the time about this.

Within the preceding 5 years, Bare had seen employees both selling and buying items in the plant when those employees were supposed to have been working.

other employees. In this regard, Bare testified that at the end of Bouchelle's terminal March 31 interview, he reminded Bouchelle about the trouble he had had with him a few weeks before. This was in reference to Bouchelle's complaint at the time about his wages. Bouchelle, in this regard, testified that about 1 week before his discharge, he had spoken to Pipes, Fairchild and Bare in Fairchild's office. Bouchelle told the three supervisors that he was not receiving the top pay in his job. He had discussed his wages with other employees who, as matters developed, were getting top pay although Bouchelle had been with Holly Farms longer than they. Fairchild told Bouchelle that he, in fact, was re-

ceiving the maximum pay for his job and that it was against Company policy for him to have discussed his wages with other employees. Bouchelle replied that such a restriction was not in the handbook. Fairchild informed Bouchelle that everything was not in the handbook and told him not to be talking about pay with other employees because it would cause dissension. Fairchild repeated that it was against Company policy for Bouchelle to discuss wages with other employees.

Plant manager Fairchild testified that he had directed that the meeting with Bouchelle be held after supervision had reported that Bouchelle was complaining inside the plant that he was not receiving top pay and was

earning less money than another maintenance employee with less time on the job. Accordingly, about 2 weeks to a month before Bouchelle's termination, Fairchild met in his office with Bouchelle, Pipes and Bare. Fairchild testified that he began by asking if Bouchelle was having a problem with his wages. Bouchelle said that he was; that he had been working for Bare for something like 2 years; that he was not on top pay and that there were other people earning more than himself. When asked what gave Bouchelle this idea, he replied that other maintenance employees had told him so. Fairchild replied that these others could have told him anything, they did not have to tell him the truth. Bare asked Bouchelle how

long this had been going on and Pipes, in turn, told Fairchild that Bouchelle had been talking to other people about Bare not having put him on top pay for the last month or two.

When Fairchild asked Bouchelle why he had not talked this over with him, if he felt that he had a problem talking with Bare, Bouchelle replied that he did not want Bare to get the idea that he was talking about him behind his back. Bare became upset, retorting that Bouchelle had been talking behind his back to everybody in the house; what was the difference? Fairchild smoothed the situation and asked Bouchelle what proof he had that he was not making top money. Bouchelle did not know what he was earning but stated that he

thought he was making $6 or $7.69 an hour and that everybody else was earning more. Fairchild told Bouchelle that he was on top pay, that he was receiving the $7.79 an hour maximum that was being paid at that time in maintenance. When Bouchelle questioned this, Fairchild told him that he could prove it and showed Bouchelle a computer printout substantiating what he had stated. When Bouchelle said that the computer printout was wrong, Fairchild asked if Bouchelle had ever looked at his pay vouchers, his check stubs. Fairchild reassured Bouchelle that the printout told him what he was earning.

After the meeting, was over, Fairchild told Bouchelle that the entire

problem could have been avoided if he had first discussed this matter with his supervisor. Fairchild told Bouchelle that he always had someone to go to. If his supervisor told him something with which he neither agreed nor understood, he always could go Fairchild. If Fairchild could not understand the problem, he could go to Fairchild's boss.

In response to Bouchelle's testimony that Fairchild had told him that it was against Company policy for him to have discussed his wages with other employees, Fairchild related that he merely had told Bouchelle on that occasion that it was not a good idea for him to talk to other people about his wages because they could tell him anything. Fairchild denied

having directed Bouchelle not to talk to others about his pay or that there was no rule or policy at the food service plant prohibiting employees from talking about pay rates. Employees talked about them all the time. He had suggested to Bouchelle only that others with incomplete information might mislead him and that the problem could have been avoided if he had spoken to a supervisor.

In crediting Bouchelle's testimony that Fairchild had told him that it was against Company policy for him to discuss his wages with other employees, I note that Fairchild's testimony that he simply had cautioned Bouchelle not to talk to other employees on this matter so as to avoid being misled was countered by Bare's

testimony that, weeks later at Bouchelle's terminal interview, Bare had reminded Bouchelle of "the trouble" he had had with him during that earlier conversation on the matter of wages. The incident apparently had registered sufficiently to have been raised by supervision weeks later when Bouchelle was being discharged. Noting, too, that Fairchild, in addition to approving Bouchelle's termination, also was involved, below, in the unlawful discharge of Joseph Richardson, admittedly for union activities, I accept Bouchelle's testimony concerning this incident as the most credible and find that the Respondents violated Section 8(a)(1) of the Act when Fairchild prohibited Bouchelle from discussing his wages

with other co-workers because violative of Company policy.

As noted by Administrative Law Judge Leiner in his Board-approved decision in Independent Stations Co.,[156] the establishment of such a rule, "without regard to circumstances relating to time, place or opportunity . . . prohibits employees from engaging in 'mutual aid or protection,' the very substance of the activities protected in Section 7 of the Act. . . . [It is] of no legal consequence that the rule did not contain within its terms the admonition that violation would lead to dismissal. The mere existence of the rule prohibiting protected conduct,

[156] 284 NLRB 394, 396-397. Also see Jeannette Corp., 217 NLRB 653, 653-654, 656, enfd. 532 F.2d 916 (C.A. 3, 1976).

even if not enforced, constitutes unlawful interference in violation of Section 8(a)(1) of the Act.

(iv) The discharge of Patricia Barker—facts

Patricia Barker[157] testified that, on April 11, about 5 minutes before the end of her shift, David Eller, her supervisor, holding her timecard, told Barker to accompany him upstairs. There, she met in the personnel office with Mary Barnes, second shift personnel manager; Eller; and Jerry Blevins, second shift plant superintendent. Barnes stated that she had heard that Barker had been

[157] Barker, first employed by Holly Farms from August 1982 until August 1988, resigned to take other employment. She returned to Holly Farms in December 1988 where she remained until terminated. When employed for the second time, Barker worked in the fillet department of the main processing plant, Wilkesboro, during the second shift.

handing out union cards during worktime. When Barker answered that this was a lie, Barnes countered that she had proof that Barker had done this. Barker asked where was the proof, repeating this request several times, and declaring that she had done her job. Barnes replied that no one was saying that Barker had not done her job but that Barker was being discharged for union activities. Barker left, slamming the door.[158]

The Holly Farms personnel change of status (discharge) form, issued April 11 and signed by Barnes gave as reason for the action taken: "Viola-

[158] Barker testified that the only thing that Eller had said to her while en route to the personnel office was that this was not of his doing. At that time, she did not know what he was talking about.

tion of known company rule - soliciting."

On March 7, only about 1 month earlier, Barker had received a 21 cent per hour pay raise for having accepted a higher-paid job of filleting chicken thighs at the suggestion of her supervisor, Eller. Previously, Barker had been packing thighs. As noted, the Respondents do not contend that Barker was terminated because of her job performance.

Barker testified that, although involved with the union campaign at the plant, she never had distributed union authorization cards during worktime. However, about 1 week before her termination, Barker had had a number of conversations in the plant with an employee named Rachel,

later identified as Virginia Rachel Wyatt. One such conversation had taken place in the hallway when Rachel, according to Barker, asked if Barker had been to a union meeting. When Barker said yes, Rachel wanted to know about the Union. Barker told her as much as she knew. Rachel again also asked Barker for information about the Union while Barker was working. Accordingly, at Rachel's request and during a break taken near Barker's locker, Barker wrote the telephone number of the union representative. After the break, she slipped the telephone number into Rachel's pocket. No one else was in the area at the time.

Barker related that when, in December 1988, she had returned to Hol-

ly Farms' employ, her supervisor, Eller, was selling Christmas tree ornaments made by his wife on the line while she was at work helping to pack chicken breasts.

She testified that during her first period of employment with Holly Farms, her then-supervisor, Shelton Goddard, had sold knives to employees while they worked on the line and, during her second period, it was very common to see the distribution of Avon and Tupperware books and solicitations for football pools during worktime. The football pool was a weekly event. In addition, an employee in Barker's department, known as Mama Sadie, sold homemade foodstuffs during worktime and employees would send money to her by a floorboy

or else run over themselves to personally buy items when they should have been working. However, about a week before her termination, when Barker was going to make a purchase from Mama Sadie, she was told that Mama Sadie no longer was allowed to sell her goods while the employees were at work and now kept her supplies in the office or upstairs. Barker has seen Eller buy items from Mama Sadie, whom Barker described as a good cook.

Barker's testimony concerning the frequency of unauthorized activities by employees in the work place during worktime which were unrelated to the Union, was corroborated by Carol Eller, a Holly Farms' production em-

ployee for more than 17 years.[159] Eller testified that since she had been working at the Holly Farms main processing plant, employees have sold many items. While working on the line, employees would solicit purchases by other employees of Tupperware and of items shown in Home Interiors or Princess House catalogues. Also, the children of many employees attended various schools that sponsored sales. Eller personally has bought many items or sold Tupperware during worktime and in work areas on her 8 a.m. to 4:30 p.m. shift. During her worktime and in her work

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[159] Carol Eller began her employment at Holly Farms by hanging chickens. When that job was eliminated, she moved to line 3 where she cut drumsticks for 15 years. When chicken cutting became computerized, she returned to hanging chickens in the packing department under supervisor Ray Owens.

area, Eller, during the week before her testimony, purchased girl scouts cookies. Although she was working at the time, Eller was not disciplined. She believed that her supervisor, Ray Owens, also, may have bought some cookies because the vendor showed them to him, as well.

Eller identified a series of six photographs taken inside the main plant. Five of these photographs, which were taken in the ladies' restroom, showed sale items on display. Only one photograph was taken on the production line. This showed an employee, Nancy Ann Anderson, reading a Home Interior catalogue on the production line while another employee standing next to her apparently was working. Anderson was shown in the

photograph as reading the magazine with her back turned to the production line. Eller explained that this production line picture was taken after Eller, having noticed that Anderson was standing on the line reading the magazine, told the lady working near her that it was too bad they did not have a camera to prove that solicitation was going on at Holly Farms. Her neighbor volunteered that she did have a camera in her car. At Eller's suggestion, the other employee left the production plant, went to her car and returned about 3 minutes later with a camera which she handed Eller. Eller told her neighbor that she did not know how to use a 35 millimeter camera. Her neighbor instructed her to push the button and

returned to work. Eller turned around and took the picture of Anderson who had continued to read the magazine for about 5 or 6 minutes. Eller underscored that the lady who had worked next to her had felt free to leave the production line, to go to her car and to return with the camera although not on break. While this other employee was getting her camera, Eller did both of their jobs.

Anderson, the employee portrayed in the photograph and called as a Respondents' witness, explained that she had examined the catalogue during a slow time in her work routine. Anderson's job at the time had been to keep the chicken bins, which were fed from a drop chute, from holding too many birds so as to prevent the

chute from stopping up and tearing the product. Before starting work that day, Anderson had agreed to the request of Victoria Johnson, the employee at the next work station, to look at Johnson's Home Interiors catalogue. About an hour after the shift began, Anderson, noting that the bins were in good shape, began to look at the catalogue which Johnson had placed near her. As it was Anderson's job to make sure that Johnson, who was hanging chickens, had enough birds to hang, Anderson conceded that she should have been turned around facing the line in the same direction as Johnson when the picture was taken. Anderson agreed that Company policy forbade selling, buying or looking at books while em-

ployees are supposed to be working and she is not aware of any other occasions, except for that shown in the picture, when employees had engaged in such conduct. Anderson testified, however, that her own supervisor, who had not been there at the time, could not have observed her.

When, 3 or 4 days later, Carol Eller had brought in the photograph and showed it to her, Anderson asked why Eller had taken the picture. Eller replied that she had a scrapbook of all of her friends and wanted to take a picture of her and put it in the scrapbook.[160]

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[160] The supervisors to whom Anderson and Eller reported testified that they were in their respective areas at the time and did not observe the above events. Both agreed that picture-taking and examining literature at the work place during worktime were against Company policy.

Anderson has continued in the Respondents' employ and there is no evidence that she was disciplined for her conduct shown in the photograph.

The record reveals that Barker's termination was precipitated by a complaint from employee Virginia Rachel Wyatt. Wyatt, assigned to pack chicken parts, testified that Barker had worked in the fillet department about 5 feet in front of her. Wyatt testified that on three occasions, Barker had stopped working and had come down the line to interrupt her on the job to tell Wyatt that she should sign a union card.

Wyatt recalled that Barker first came to her work station at an unrecalled time after the start of the Union's campaign and asked Wyatt,

then working, if she had signed up for the Union. Wyatt noted that Barker, too, should have been working at the time. Barker returned to Wyatt's station later in the same shift and again asked if Wyatt would be interested in signing a union card. Wyatt did not answer.

Wyatt related that, on the next night, Barker stuck a paper with a name and telephone number on it in Wyatt's pocket, telling Wyatt that it was the name of the Union and the telephone number where Wyatt could get in touch with them. This third incident occurred while Wyatt again was working and at a time when, as Wyatt testified, Barker, too, should have been working.

Thereafter, on the Monday following a Saturday union meeting, Barker told Wyatt on the stairs that she had been missed at the meeting.

Wyatt, thereafter described the incidents concerning Barker to personnel manager Barbara Mathis, who asked Wyatt to give a written statement that Barker had approached her several times concerning the Union. Wyatt denied having asked Barker for any union materials or for the Union's telephone number, which number she gave to Mathis when making the statement.

Wyatt averred that, during the preceding 5 years, no one had approached her on the line to request that she do anything not related to work. She has not seen employees at-

tempting to sell or pass any type of material to other employees on the line and no one had approached her for such purposes. Employees at work were allowed to talk to employees next to them if they could hear and understand what the other employee is saying. Wyatt, personally, had never spoken to those working next to her but had overheard conversations between other employees.

in February 1990, Wyatt, who had been working in the main plant fillet department for about 2 years, packing thighs, was moved to the packing department where she packed chicken parts. Since she no longer was required to trim out shattered bones left in the parts that she packs, her new job, which is paid at the same

rate, is easier on her than were her duties in the fillet department.[161]

Mary Barnes, second shift personnel manager, testified that, on April 11, personnel manager Barbara Mathis, to whom Barnes reported, had remained on duty for part of the second shift. At that time, Mathis told Barnes that Wyatt had signed a statement, in Mathis' possession, stating that Patricia Barker had asked Wyatt to join the Union. Mathis told Barnes that, if necessary, she would stay and take care of this matter, but preferred that it be taken care of by the second shift. Barnes read the statement referred to by Mathis

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[161] I find no evidence that Wyatt's new, less physically demanding job was a reward for having cooperated with the Company.

but did not personally investigate Wyatt's charges against Barker.

Barnes asked Barker's supervisor, David Eller, to bring Barker to the personnel office. Also present at the time were Jerry Blevins, the second shift plant superintendent and Eller, neither of whom said anything during the interview.

Barnes told Barker that it had been brought to her attention that Barker had been soliciting for the Union during worktime, at her work area, and that Barker was being terminated for having interfered with the work of another employee by soliciting for the Union. Barker replied that she did not understand what Barnes was saying. Barnes told Barker that she had a statement,

which Barker asked to see. Barnes, who did not identify the complainant, told Barker that she did not have the statement at her disposal at the time but that if she needed to see it, she could go to Barbara Mathis. Barker left the office without further response.

Barnes testified that although Holly Farms, depending upon the situation, had a system of progressive discipline whereby discharges were preceded by a series of oral, then written, warnings, no consideration was given to discipline less severe than discharge for Barker even though she was a well-regarded employee who had received a higher paying job and

accompanying pay raise only about a month before.[162]

(v) The discharge of Raymond K. Huffman, Jr.—facts

Raymond Huffman[163] testified that on April 7, Luke Roten, his immediate supervisor told him that Barbara

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[162] Sadie Mae (Mama Sadie) Vannoy, a fillet department employee, testified that for the past 20 years she had been selling various food items, including homemade sandwiches, cake, candy and pies, in a hallway separated from the fillet room by a wall. During the years that she has been doing this, she always had sold these items in the same place and only during her break time. If foodstuffs were left over, at the end of her work shift, she would set another display in the hallway where employees could make purchases as they left. She did this while waiting after the end of her shift for her son to finish work and pick her up. No Company representative ever had spoken to Vannoy about items she sold in the hallways. She did not know about the purchase and sale of other items or of football pools, and was aware only of her own business.

[163] Huffman was employed by Holly Farms for 10 1/2 as a floor-boy in the eviscerating department, main processing plant. His duties involved keeping the lines supplied with chicken parts and paper towels and helping to roll out barrels of discarded waste. Huffman was expected to leave his area to go to other departments for supplies and to help keep the floors clean.

Mathis, the personnel manager, wanted to see him. Accordingly, he met with Mathis in her office. Also present were main plant manager Harold Eller; Gary Hamby, processing superintendent, first shift; and Huffman's supervisor, Roten. When Huffman entered the office, Mathis asked if he knew the Holly Farms' Company policy. When Huffman said yes, Mathis told him that the Company had a statement saying that Huffman had been harassing somebody on the line about union cards; that Huffman had been going person to person, line to line, about the Union; and that he now was being terminated. Huffman told Mathis that he was not for the Union right then and asked the Company to reconsider and give him his job because he

needed it. Mathis shook her head and said that they could not do that. She told Huffman to leave and that a guard would escort him out the door, but that he could come back for his check on the following Friday at which time he could bring in his uniforms. Other than that, the Company would have him arrested if he returned to its property.

Huffman testified that, before the start of the union campaign, the Company had not restricted him from engaging in discussions in the work place and had not told him that he could not talk during worktime. Huffman had supported the union campaign, speaking to employees about the Union during breaks. However, he denied having interfered with employ-

ees while they were working. On one occasion, when employee Agnes Mash had spoken critically of the Union in the hall to other employees, Huffman told her that she should not say anything about the Union without knowing something about it. He suggested that Mash attend one of the union meetings and listen to union organizer R. W. Brown. Huffman recalled having spoken to Mash about the Union on one other occasion, but not in her work area which was about 40 yards from his work station. Huffman denied ever having approached anyone working on the line about the Union while they were working. He spoke to employees about the Union when passing them on the line, but only if they stopped him to inquire.

Huffman averred that earlier on April 7, the day he was terminated, employee Virginia Brown, who worked in the area, had approached and asked Huffman to read an article she was holding. Huffman told Brown that he could not read. Brown, instead of returning to work, then began to read the article, which was anti-union, to eviscerating line supervisor Ted Roten for about 2 to 3 minutes. Roten did not say anything to Brown while she read and, to Huffman's knowledge, Brown was not disciplined or warned because of having then read that article.

Like Branscome and Barker, Huffman had observed other distractions in the work area. In the spring and summer of 1989, supervisor Jean

Waters sold perfume and what appeared to be Avon products and she and Norman Hale also sold football cards. In the knife room, where knives and scissors were ground and repaired, five employees named by Huffman played poker during worktime and had just finished a short round before his discharge. There also was a football pool conducted in work areas.

Huffman testified that on a number of occasions his own supervisor, Luke Roten, would ask him to get employees who had overstayed their time from the break room. Most recently, this had occurred about a month before Huffman's termination when Roten asked Huffman to get employees Tina Eller and Lynn Billings, who had

overstayed their break by 5 to 10 minutes.[164]

The record reveals that Huffman was terminated pursuant to a complaint initiated by Agnes Mash.[165] Mash testified that in the spring, Huffman walked from line 2, where he was assigned, to behind Mash while she was at work and asked if Mash had signed a union card. Mash said no. When Huffman asked why, Mash replied because you do not fool around with things you do not know about. According to Mash, Huffman told her

[164] Roten confirmed Huffman's testimony that he would send Huffman to get employees from the break room who had stayed past the end of their break periods. When Huffman brought them back to work, Roten simply would chide these employees, but there was no evidence that any employee was ever disciplined for such conduct.

[165] Mash, assigned to line 1, was pulling craws and using clippers to cut the necks of the chickens as they passed her station.

that he went to all union meetings and got free drinks. He then moved down the line.

When Mash's break began, she approached Jean Waters[166] and told her that little Raymond is union crazy; that Huffman had walked over to her and had bothered her while she was working.

Later that day, Mash's immediate supervisor, Ted Roten, told her that she was wanted in the office. He accompanied Mash to the office of personnel manager Barbara Mathis who asked if Huffman had been bothering

[166] Waters was a floating, or extra, supervisor who worked on either lines 1, 2 or 3 as needed. Waters, too, had been selling Avon products at the plant for the past 6 or 7 years, but denied having done so during working time or in work areas. Her practice was to leave a catalogue and order forms in the break room where employee-customers could fill in and leave the forms.

her; what had he been doing. Mash told Mathis that Huffman had been on her line while she was working and asked if she had signed a union card. While Mash waited, Mathis prepared a statement which Mash signed and returned work.

Huffman was terminated the day Mash had mentioned him to Waters.

Mash explained that her objection to Huffman's brief visit had been that she was required to stop working and to turn around when Huffman asked if she had signed a union card. Although Huffman had been with Mash for only a few seconds, Mash had been holding her clippers and the delay in her concentration, at the existing line rate, could have caused Mash not to process certain chickens as they

passed her at a rate of 70 per minute.

Waters confirmed that at the start of her break, Mash had told her that "Little Raymond" had gone union crazy; that Huffman had come to the line and asked if she had signed a union card; that she had told him no, she did not want to; and that Huffman had really bothered her. Mash told Waters that she did not want Huffman bothering her when she was trying to do her job. Holly Farms had been good to Mash and she did not want anything to do with the Union and did not feel that Huffman should be talking to her. Waters then reported this conversation to plant superintendent Danny Eller, who, in turn, conveyed the incident to Mathis.

Mathis recalled that when Mash arrived at her office, she appeared very upset—pale with trembling hands. Mathis asked what in the world was wrong. Mash replied that she was tired of Raymond Huffman aggravating her and talking to her about the Union. She related that when Huffman walked over behind her while she was using clippers to pull craws, it had made her mad and upset. Mash complied with Mathis' request that she give a statement concerning this incident.

Mathis next consulted with plant manager Harold Eller. They reached a decision to terminate Huffman's employment. Accordingly, Mathis called Huffman's immediate supervisor, Luke

Roten, and asked him bring Huffman to her office.

When Huffman, accompanied by Luke Roten, arrived at Mathis' office, she asked if Huffman knew the Company policy about harassing other employees. Huffman said yes. Mathis went on that she had understood that Huffman had been harassing other employees on other lines and that the Company was going to have to terminate him. Huffman protested that he had not done anything. Mathis told him that she had a signed statement accusing him of harassing Agnes Mash on the line while she was working. Huffman reiterated that he had not done anything. Mathis related that Mash told her that Huffman had come to her job station, had harassed her

and interfered with her work, and that Mash had been afraid that she was going to get cut because he surprised her from the rear. Mathis did not ask Huffman for his version of events, claiming that Huffman had just kept repeating that he had not done anything. Mathis also had not consulted with Huffman's immediate supervisor, Luke Roten, about terminating Huffman, explaining that the incident had not occurred on Luke Roten's line. Although Mathis stated that she would have spoken to Luke Roten had the incident occurred in his jurisdiction, she similarly did not consult with supervisor Ted Roten on whose line it did take place.

Luke Roten testified that, prior to Huffman's discharge, only he had ter-

minated employees assigned to him, which he did when they had missed too much work or had not produced.

Luke Roten related that in 1990, he had given a written reprimand to a male employee who had harassed a female employee while both, supposedly, were at work on Roten's production line. The male employee had tried to speak to the female employee who, wearing earplugs, had ignored him. The male employee, stationed next to the female worker, took out her earplugs and set them in the drain. The reprimand was given for pulling out her earplugs. To Roten's knowledge, before Huffman was discharged, there had been no discussion about issuing Huffman a written warning as an alternative.

The Respondents' witnesses contradicted various aspects of Huffman's testimony. Employee Virginia Brown denied having read any literature to Huffman or even to herself while inside the plant. Brown's supervisor, Ted Roten, did not recall that Brown ever had read a newspaper article to Huffman or anyone else in the work area. Ted Roten related that because Brown processed a great deal of product that passed her on the line at the described rate of 70 birds per minute, he would have missed her quickly had she left her station to play poker in the knife area.

Eviscerating department employee Lola Mae Johnson, assigned to line 4, was absent from work on sick leave from March 28 until May 17, but had

seen employees buy and sell merchandise only in the cafeteria, break room and nonwork areas, but not in work areas. Johnson did not play cards but, in any event, would not have had time to do so at the plant. Roscoe Baumgarner, a first shift knife sharpener in the eviscerating department, and offal department employee Freddie Dean Wilmoth who, before 1989, had worked in the knife room, both testified that they had not seen poker or other card games in the knife room or elsewhere in the plant and that all employee purchases and sales of merchandise had taken place outside work areas. The sanctity of work areas from commercialism and gambling was further attested by eviscerating department employee Ron-

nie W. Huffman, unrelated to Raymond Huffman, and main processing plant employee Norman Howell.

(vi) The discharges of Bouchelle, Barker and Huffman—discussion and conclusions

Under Wright Line, A Division of Wright Line, Inc.,[167] the Board requires that the General Counsel make a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the Employer's decision to act against its employees. If this is established, the burden shifts to the Employer to demonstrate that the same action would have taken place even in

[167] 251 NLRB 1083, enfd. 662 F.2d 899 (C.A. 1, 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

the absence of the protected conduct.[168]

Here, the General Counsel established that Holly Farms, at the time, was extensively utilizing conduct violative of the Act at the Wilkesboro complex in order to discourage unionization.[169] It has been found above that in the period when Bouchelle, Barker and Huffman were terminated, Holly Farms' officials had engaged in a counter-campaign involving unlawful conduct, which included, but was not limited to, causing the arrests of three driver employees who handbilled for the Union during non-work time and in non-working areas;

[168] Hudson Neckwear, Inc., 302 NLRB No. 15 (JD 4).

[169] Custom Bank Glass Company, et al., 304 NLRB No. 46, sl. op. 7.

threatening the arrests and discharges of others; issuing warnings to employees; soliciting grievances from employees and promising to remedy them; threatening closure and contracting of trucking operations and attendant job loss; threatening unspecified retaliation if employees supported the Union; threatening discharge; and coercively interrogating employees concerning their union sympathies. Certain unlawful acts were persistently repeated and publicized so as to affect additional employees.

The General Counsel established that, in this coercive climate, the responsible Company officials, before discharging Bouchelle, Barker or Huffman, knew of their union activities and that such activities had

been the immediate proximate cause of the disciplinary actions against them. The question in each instance is whether the discharges, nonetheless, were justified because these employees had violated a valid, consistently enforced no-solicitation rule, as the Respondents assert.

The respective discharges of Bouchelle, Barker and Huffman were respectively prompted by complaints to management from individual employees when the Respondent's officials knew were opposed to the Union. The officials who discharged Bouchelle and Barker did not personally investigate or interview the complaining employees before taking action and in none of the three cases did the discharging official attempt to obtain the

accused employee's side of the story. Instead, each of the three dischargees were terminated about as quickly as the complaints became known, in departure from existing Company policy. In this regard, second shift personnel manager Mary Barnes testified that, although Holly Farms had an available policy of progressive discipline whereunder employees usually were not discharged for their first offenses, but were penalized for later infractions by a series of increasingly severe disciplinary actions which, for subsequent infractions, ultimately could lead to termination, no consideration had been given to any lesser penalty for Barker than termination. Similarly, in spite of Barnes' reference to the

policy of progressive discipline, lesser penalties than discharge similarly were not considered for Bouchelle and Huffman. This was true although all three employees had performed their work satisfactorily and were considered desirable employees.

In the rush to terminate Huffman, personnel manager Mathis did not take time to consult with Huffman's immediate supervisor, Luke Roten. She explained this departure by stating she would have done so had the asserted offense occurred in Luke Roten's production line rather than on the line overseen by supervisor Ted Roten. However, as noted, she did not speak in advance to Ted Roten, either. Plant engineer Bare, who terminated Bouchelle, did not know at

the time whether Hunt, the employee whom Bouchelle, assertedly, had disturbed, was on break or even in an assigned work area when Bouchelle had approached him.

Considerable testimony was adduced as to whether Holly Farms had strictly enforced rules prohibiting solicitation and distribution in the work areas during work time. The General Counsel's witnesses, on this point, described a work place suggestive of a bazaar, while the Respondents' witnesses who, in practical terms because still employed might have found it difficult to do otherwise, spoke of pristine work areas unsullied by commercialism and gambling—football pools and card games—except in

fringe non-work areas at breaks and during other non-work times.

I accept the logic of the Respondents' evidence that it had tried to exclude buying and selling and other distractions from the work areas during work time. It would be difficult for the Respondents to safely and effectively operate their production lines in circumstances where employees at work were readily subjected to interruptions. This is particularly true with respect to the Respondents' operations where employees used knives, cutting machines, clippers and other sharp implements in their work and where the conveyor systems, within comparatively short time periods, quickly carried large numbers of chickens by the work stations for

processing. Absent discriminatory enforcement, a Company rule against solicitation and distributions in work areas during work time is lawful and, with respect to the Respondent's fresh chicken processing and food service operations, may be quite necessary.

However, the record shows that Holly Farms' no solicitation/no distribution rule was discriminatorily enforced with particular severity against the three pro-union dischargees. The record indicated that termination was not the automatic or necessary discipline regularly applied to employees who interrupted their own work or that of others on the production lines. Although Nancy Ann Anderson's supervisor might not

have been present to see her reading a catalogue with her back to the production line, as shown in the above-described photograph, by the time of the hearing, the Respondents, when they called Anderson to the stand as their witness, were well aware of this incident. Yet, the record contains no indication that Anderson was disciplined in any way. Both plant engineer Bare and supervisor Luke Roten testified that, in the past, they had witnessed, without incident, sales and purchases in the plant transacted by employees who should have been working, and Huffman's immediate supervisor, Luke Roten, had merely issued a written reprimand in response to the 1990 complaint of a female employee on his line that a

male employee, working nearby, had pulled the plugs from her ears after he had unsuccessfully tried to talk to her while she was working. Although production also was adversely affected when employees overstayed their breaks, making it occasionally necessary for Luke Roten to send Huffman to bring such employees back to the line, no employee ever was disciplined for that infraction.

Anderson's tolerated and photographed reading on worktime while turned away from her work station; the overstayed breaks; the incident concerning the employee who received a written warning for pulling the plugs from the ears of his unwilling fellow worker; and the sales transactions witnessed by Bare and Luke Ro-

ten involving employees who should have been working; do not appear to be significantly lesser interruptions affecting production than those charged to Bouchelle, Barker and Huffman.

Accordingly, a combination of factors, including that the Respondent's officials admittedly knew of the union activities of Bouchelle, Barker and Huffman when discharging them; that the Respondents' many violations of the Act established their strong union animus at the time; that, absent union involvement, other employees had been treated more leniently for otherwise comparable offenses; that, with respect to Bouchelle and Barker, the Respondents' terminating officials did not investigate beyond

the relayed complaints of the employees known to be anti-union with a result that potentially important facts were unknown; that, in the apparent rush to discharge, the Respondents did not seek explanations from the accused employees; and that the Respondents departed from their own policies of progressive discipline and of consulting with the affected employees' immediate supervisors, indicates that the three discharges were discriminatory in nature. The abrupt treatment afforded Bouchelle, Barker and Huffman seems particularly harsh since all three, as noted, were considered by the Respondents to have been good employees whose retention might have been beneficial to the Respondents. In this connection, Bark-

er, only shortly before her termination, had been given a more highly-paid job, and it was noted on Bouchelle's discharge form that the supervisors involved would, under certain circumstances, be willing to rehire him. I find that these considerations sufficiently support the General Counsel's argument that the union activities of Bouchelle, Barker and Huffman were principal motivating factors in the decision to terminate them.

This having been shown, I further find that the Respondents have failed to meet their burden of demonstrating that these employees would have been discharged absent their union activities.

Accordingly, I find from a preponderance of the credible evidence that Alvin Bouchelle, Patricia Barker and Raymond K. Huffman, Jr., were discriminatorily terminated in violation of Section 8(a)(3) and (1) of the Act.[170]

(vii) The discharge of Joseph Richardson—facts and conclusions

As the parties agree that Joseph Richardson[171] was terminated for his union activities, the lawfulness of his discharge is dependent upon whether, as group leader on a receiving dock, he was an employee within the meaning of Section 2(3) of the

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[170] Visador Company, 303 NLRB No. 167 (JD 11-12).

[171] Richardson, with Holly Farms for about 12 years, during his last 3 years, had been group leader on the receiving dock at the food services (Convenience Foods) plant in the Wilkesboro complex.

Act and protected under the Act, or whether, as contended by the Respondents, he was a statutory supervisor who had engaged in activities that rendered him vulnerable.

Synthesizing the testimony of Richardson and that of food service plant manager David Fairchild,[172] on March 28, Richardson, was called to Fairchild's office where he met with Fairchild and the then-assistant plant manager, Barry Hatfield. Fairchild asked Richardson what his job was at Holly Farms. When Richardson replied that he was a group leader, Fairchild asked if Richardson understood that being a group leader meant that he was considered a part of the

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[172] Fairchild has continued in the same capacity since the Tyson takeover.

management team. Richardson replied yes, but he did not get into the business much.[173] Fairchild related that he told Richardson that he had a report that Richardson has solicited other people and that he no longer had a job with the Company. Richardson, in turn, testified that he denied to Fairchild that he had participated in organized labor, although admitting in testimony that he had solicited employees on the Union's behalf. Fairchild, however, would not discuss the matter and gave Richardson two choices—either quit or be discharged. Nothing further was said and Richardson left the office and his job. While Richardson's

[173] Richardson testified that, during this interview, he did not agree that he was part of management.

change of status form indicated that he had resigned after reprimand, Richardson testified that he had had no alternative but to leave.[174]

Of about 325 first shift employees, 15 were group leaders variously assigned in the plant. Usually, each supervisor had three group leaders reporting to him.

At the receiving dock, Food Services would receive raw products, such as whole birds and various chicken parts and, occasionally, chemicals for cleaning purposes. The receiving dock also had a trash com-

[174] Although Fairchild had spoken to Richardson on numerous occasions about his job performance and had explained Richardson's job duties as a group leader to him, Fairchild did not recall any specific time prior to the March 28 terminal interview when he had told Richardson that he was a member of management.

pactor where waste, offal and other condemned products were eliminated.

Richardson, as group leader on the receiving dock, reported to supervisor Tony Davis who, in addition to the receiving dock, oversaw employees in the beehive room[175] and the metromatic room.[176] It was Richardson's job to work alongside a receiving dock crew that varied in size according to the number of trucks to be unloaded, but which averaged four to six employees. Richardson's crew regularly included a forklift operator, a trash compactor operator and four employees who did check-weighing. Richardson, under Davis, was

[175] The machines in the beehive room separated meat from rib cage bones.

[176] Metromatic machines sized out chickens.

generally responsible for unloading, receiving, check-weighing, removing trash and condemned materials and for the cleanliness of his area.

Arriving for work about 15 minutes before his crew, Richardson stopped by the transportation department to learn what trucks were in and then proceeded to the plant. He then would call the transportation department for a truck to be placed in one of the dock areas where the crew would unload it. When the truck was unloaded, it would be check-weighed. This was a spot checking procedure to determine if the proper weights were being received. The chicken parts were received in corrugated boxes of 70 to 1,200 pounds, with ice on the top of the box and the contents on

the bottom. The crew would record the weights on the labels of the received boxes by emptying the boxes to be tested; by weighing the emptied boxes to obtain tare, and by refilling the boxes with ice and product. After the crew's checking had verified the shipment, Holly Farms paid for the actual weights received.

The check-weighed product then was moved to the large cooler which also contained a large ice machine which made ice for use in the plant.

The trash compactor operator put accumulated trash into the compactor. The crew also took away offal from the communited meat department, where meat was mechanically removed from the bone, and from other places in the plant where product was condemned

because fallen on the floor. The forklift was used to dump such products onto offal trucks to be driven to rendering.

Richardson also was responsible for ensuring the cleanliness of the areas outside of the plant and it was necessary to wash down around the trash compactor and to remove droppings from trucks. The receiving department also cleaned the cooler once a week. Richardson joined his crew in performing all of the above tasks.

Richardson, unlike the salaried supervisors, was hourly-paid, earning $1/hour more than his crews' base rate and 50 cents/hour more than the next highest-paid member of his crew. Also unlike supervisors, Richardson

received time and one-half for overtime work. While supervisors wore tan pants and white shirts, he wore the same uniform as his crew—gray trousers and a blue shirt.

Richardson did not substitute for Davis or any absent supervisor. A supervisor from another department would act for Davis in such circumstances. Richardson has filled in for absent group leaders, and other group leaders have replaced him in his absence, as has Davis. Unlike supervisors, Richardson was paid for unused vacation time lost during a given year, but he could not carry unused vacation time past the year in which it was earned. Supervisors received paid sick days; group leaders did not.

While Richardson usually had the same employees assigned to him, particularly on the forklift, trash compactor and for check-weighing, he might not have the same number of employees each day—depending on the number of incoming trucks. If he felt that extra help was needed, he would ask Davis for additional employees or, in Davis' absence, another supervisor. These supervisors, if able, would assign the extra personnel. If additional help was not available, Richardson and his crew would have to get along on their own. When the additional employees no longer were needed, Richardson, advising Davis, would send them back to their regular assignments.

Richardson had no authority to hire, fire, discharge, discipline or transfer employees to other plant areas, give employees time off or permission to come in late.

Richardson did the paperwork connected with incoming shipments; told any extra helpers where to work; assigned unloading slots at the dock to incoming trucks; instructed those working on the dock as to where to put unloaded products; and, generally, under Davis, was responsible for the proper performance of work in his area. Nonetheless, the record shows that the work performed by his crew members was basically repetitive and that the people who worked with Richardson knew to perform their jobs without specific direction from him.

Even employees temporarily assigned from other plant areas to help on the dock, as required, often had worked there before and basically knew what to do.

While Fairchild testified that Richardson was consulted by supervision about the work performance of his crew members and could effectively recommend pay raises, Richardson denied that he had such authority although he occasionally was asked by Davis how well certain employees were performing. Since there were layers of supervision between Fairchild and Richardson and as Davis, the immediate supervisor did not testify, I find that Richardson knew his own practical authority better than did Fairchild who had less opportunity to

observe and, therefor, I credit Richardson on this point.

As the evidence establishes that Richardson's instructions to employees were routine and did not require the use of independent judgment; as his duties and responsibilities were limited by the nature of the work involved; as there was no showing that Richardson possessed or exercised any of the indicia of authority defining supervisory status, as set forth in Section 2(11) of the Act, and, noting, too, the similarities between Richardson's duties and status and those of dock leadman Freddie Lee Martin in Central Freight Lines, Inc.,[177] where supervisory status was

[177] 250 NLRB 435, 446-447, 449-450, enfd. 653 F.2d 1023, 108 LRRM 2457, 2458 (C.A. 5, (continued...)

not found, I conclude that Richardson, when terminated, was not a supervisor within the meaning of Section 2(11) of the Act but was an employee, as defined in Section 2(3) of the Act, and, therefor, entitled to the Act's protection.

Accordingly, having found, above, from the undisputed evidence that Richardson was discharged because of his union activities, and also having found, contrary to the Respondents, that he was an employee within the meaning of the Act, I conclude that the Respondents violated Section 8

[177](...continued)
1981). Also see W.C. McQuaide, Inc., 220 NLRB 593, 611, enfd. in relevant part 552 F.2d 519, 94 LRRM 2950, 2959 (C.A. 3, 1977); supplemented at 237 NLRB 177 and 239 NLRB 671, enfd. 617 F.2d 349 (C.A. 3, 1980).

(a)(3) and (1) of the Act by terminating him.

(b)(i) The July 2 pay increase—facts

By memorandum to its hourly employees, dated June 16, over the signatures of Dr. Ken May, chairman and chief executive officer, and Blake Lovette, president and chief operating officer, Holly Farms announced that, effective July 2, that Company's hourly employees who worked in nonbargaining units would receive a 25 cents-an-hour wage increase, and that the Company would implement a wage adjustment of 4 percent for its employees covered by production pay systems. The memorandum noted that this wage increase would not have been implemented until January 1, 1990, except that the Company's mar-

kets were better than anticipated and Company-wide efficiency had increased, thereby enabling implementation of the wage increase 6 months earlier than otherwise. The memorandum ended on a congratulatory note to the employees.

The General Counsel and the Union contend that the granting of this raise represented a departure from Company policy which did not provide for pay increases at that time, and was a retreat from its December 16, 1988, written announcement of a one-time 3 percent bonus for 1989 based on the employees' projected 1988 earnings. This bonus was to be distributed on December 22, in addition to the employees' regular Christmas bonus. The December memorandum

specified that the employees would be receiving the 3 percent bonus as an expression of Company appreciation for work well done and instead of any wage increase during the coming year. This was because the Company had found, in comparing itself to its competition, that its pay rates, in most instances, were higher than the rest of the poultry industry. Accordingly, to keep Holly Farms competitive with other poultry companies, the Company announced that it was making that special advance payment for the employees' 1989 efforts and that it would not again raise wage rates for 1989.

Holly Farms' president Blake Lovette principally explained the general wage increase given to Holly

Farms' employees, effective July 2, shortly before the takeover by Tyson. He related that after the fiscal year that ended in May 1988, Holly Farms had implemented Company-wide efficiency plans closing certain processing plants and consolidating driving operations with a result that employment had been reduced by more than 1,000 jobs. In December 1988, while the Company was implementing a plan that was likely to take at least 2 years to fully put in place, Lovette did not want to follow the Company's normal practice of announcing a wage increase in December 1988, to become effective in January 1989, because of market uncertainties. Accordingly, instead of a pay increase, he gave the employees the one time bonus-type

check amounting to 3 percent of their 1988 wages as their pay increase for 1989. This enabled the Company to give the employees a wage increase without raising the pay base and the job benefits predicated on that pay base, and to avoid getting further out of line with its competition.

Lovette explained that, although he had announced that no raises would be given during calendar year 1989, as matters developed, the Company did extremely well during the first half of 1989. Most plans that had been effectuated during the preceding 9 months had begun to work. The reduction of about 1,000 jobs had had an immediately beneficial financial effect but, most importantly and unexpectedly, in the spring of 1989,

chicken market prices took a sudden 20 percent per pound increase so that the fourth fiscal quarter earnings, covering March, April and May, constituted a record quarter in Company earnings.

Accordingly, on the recommendation of senior management, Holly Farms gave a 25 cents/hour pay increase to its unrepresented employees, effective June 2, and, around June 24, gave a 4 percent pay increase to all production systems employees at all locations, excluding the processing plants at Center, Texas, and Glen Allen, Virginia, which locations then were, and have continued to be, under contract with United Food and Commercial Workers Union, AFL-CIO, CLC.

The raise also was not given to employees in the Holly Farms drivers-yardmen transportation department unit, which the above seven local unions had been certified to represent since March. During contract negotiations for that unit, Holly Farms had offered the Unions the 4 percent pay increase for the drivers, tied to a proposal that would leave wages as they were for a 1 year period. This offer remained on the table, unaccepted, until withdrawn by Tyson after that Company assumed control.

(ii) The July 2 pay increase—discussion and conclusions

In Elston Electronics Corp.,[178] the Board restated the presumption

[178] 292 NLRB 510, fn. 2, 525-526.

that when an employer announces a wage increase after the start of a union's organizing campaign, the Board automatically and without further showing will presume that the increase was granted in an effort to influence the campaign and that the burden then shifts to the Respondent Employer to rebut this presumption. This can be done by showing that the increase would have been granted without regard to the protected union activity.[179] As indicated in Elston Electronics Corp., supra, the Respon-

[179] Member Cracraft's concurrence in Elston Electronics Corp., supra, at 510, fn. 2, was not based upon her adoption of the presumption that a wage increase timed after the start of a union's campaign was unlawful but, rather, that when such a coincidence occurs "absent an affirmative showing of some legitimate business purpose for the timing, it is not unreasonable to draw the inference of improper motivation and improper interference with employee freedom of choice."

dent may meet this burden by showing that the pay increase would have been granted without regard to the union activity by demonstrating the existence of an established pattern of wage increases, a pre-organizing administrative commitment to the increase, or any similar legitimate business justification. As stated in Zarda Brothers Dairy, Inc.:[180]

> The unlawfulness of the granting or announcing of benefits during the Union's organizational effort depends on whether from all the circumstances, the employer's purpose was to cause employees to accept or reject the representative for collective bargaining . . . and upward revisions of employment terms are presumptively unlawful, even if made upon determinations made prior to the advent of union activity.

[180] 234 NLRB 93, 112.

In determining the validity of the Company-wide pay raise given here during the Union's campaign, it is relevant that Holly Farms' Wilkesboro employees, targeted by the Union for organization, were but a percentage of the total number of employees who were given the pay raises. In Delta Faucet Company, A Division of Masco Corporation of Indiana,[181] that consideration was a factor in the dismissal of a related allegation. Here, in addition to Wilkesboro complex employees, who, with noted exceptions, received the disputed pay raise, wage increments concurrently also were provided to employees at the Holly Farms' plants in Harrison-

[181] 251 NLRB 394, 399. In Delta Faucet, as here, the pay raise in issue was not given at a regularly-scheduled time.

burg and Temperanceville, Virginia; Monroe, North Carolina; and Seguin, Texas. As noted, this pay raise was not given to union-represented employees in Holly Farms' transportation department and at its Center, Texas, and Glen Allen, Virginia, plants. The present case, however, differs from Delta Faucet, supra, in that the pay raise in that matter was accelerated under a tangible need to comply with the effective date of a national inflation guideline and there had been far less anti-union animus. The size, timing and applicability of the wage increase given here proceeded entirely at the Respondents' option and ran contrary to relevant policy declarations made in mid-December 1988, only days before

the Unions' campaign became known to management.

Accordingly, while I accept that Holly Farms' business situation improved during 1989 and that employees at the Company's locations other than Wilkesboro also received the same across-the-board pay raise, the granting of these raises in the circumstances herein, just a few weeks before the representation election for the live haul employees and in the midst of a concurrent organizational drive among Holly Farms' Wilkesboro production employees, leads me to conclude that the July pay raise was timed to induce those employees to reject the Union. As noted, this pay raise not only was

not scheduled,[182] but was inconsistent with the Respondent's December 1988 announcement, just before the Company concededly had learned of the organizing drive, to substitute the 3 percent bonus for any wage increases during 1989 and thereby avoid elevating the pay base and dependent benefits. Also, as argued by the General Counsel, the timing of the pay raise was inconsistent with what, until only shortly before, had been happening within the live haul department where the drivers had found it necessary to complain during their above interviews with live haul manager Ray Lovette that they were unable to live on their income from 4

[182] Customarily, wage increases were announced in December to become effective during the following month.

day workweeks. Also, while Holly Farms' business might have improved during 1989, there was no indication as to how long the good times would last, and conditions still were not sufficiently good to have deterred Holly Farms from seeking a purchaser for its business. In fact, the raise became effective just 2 weeks before Tyson's imminent takeover.

Accordingly, I find that the pay increase that became effective on July 2, as applied to live haul unit and production employees was discriminatorily given to induce its employees in the live haul and potential production bargaining units not to support the Union. In so doing,

the Respondents violated Section 8(a) (1) and (3) of the Act.[183]

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[183] Marines' Memorial Association, d/b/a Marines' Memorial Club, 261 NLRB 1357, upon which the Respondents rely, is readily distinguishable from the present situation. In Marines' Memorial Club, supra, the Employer had followed a practice of giving its employees two pay raises a year, effective each January 1 and each July 1. In 1980, because of adverse financial reasons, the Respondent in that matter delayed the January raise for 1 1/2 months, into February, and then provided a smaller increase. The Employer gave the next raise early, on June 1, rather than July 1, and in amounts substantially larger than the February 15 increase. The Board found that the deviations involved in the February 15 raise were based on ordinary business considerations and that, as established by the Employer's credible testimony supported by business records, the earlier June 1 raise was made possible by a dramatic improvement in its business profitability and that the June increases had been made larger to make up for the smaller prior raise which, also had been delayed by 1 1/2 months. The Board noted that the deviations that had occurred in connection with the February raise were before the start of union activities and that the changes involving the timing and amounts of the June raise were good faith attempts on the Employer's part, in view of "dramatically" improved business conditions, to enable its employees to recover from the delayed, smaller February increase. Here, unlike Marines' Memorial Club, the Respondents did not attempt to adhere to any time structure for the giving of pay increases, but rather departed not only from its own existing scheduling for granting of raises, but, also, from its announced intentions in (continued...)

(c) The alleged unlawful subcontracting of transportation department drivers' work—facts and conclusions

The General Counsel and Unions contend that since the seven local unions' March 24 certification as bargaining representative of Holly Farms' transportation division unit of drivers and yardmen, that Company retaliated for its employees' selection of the Unions by increasing its use of outside freight carriers to perform hauling previously done by Holly Farms' long distance drivers. The General Counsel and Unions charge that the disputed increase in subcontracting diminished the drivers' job

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[183](...continued) that regard. The Respondents' generousity at the critical pre-election time when the July 2 raise was given also was inconsistent with the 4 day workweek afforded live haul drivers only a short while before.

security, work opportunities and incomes.

The Respondents who, in addition to their own trucks, long had used outside freight carriers, agree that Holly Farms in 1989 did increase the work made available to outside carriers. However, the Respondents contend that this was but a continuation of a program that had been planned in detail and implemented well before the start of the Unions' organizational campaign and was carried, forward, in response to legitimate business needs unrelated to the Unions.

Long distance drivers William Franklin Johnson, John E. Danner, Harden Branscome, Teddy Ray Hayes and Gene Hester testified that they had lost work time and income when Holly

Farms, because of the Unions' successful campaign and its aftermath, increasingly contracted out what had been their unit work.

Johnson who, unlike the other above-named Wilkesboro drivers, was based in Glen Allen (Richmond), Virginia, testified that, in 1988 at various Holly Farms' facilities, including Glen Allen, he had seen outside carriers' trucks at Holly Farms on an average of 2 or 3 days a week, but that from the beginning of 1989 until Tyson's July takeover, outside carriers' trucks were on Company premises every day.

Danner related that from December 1988, when the Union's campaign began, until the March election, his assigned trips were about 15 percent

below the corresponding period of the previous year. After the March election, the length and frequency of his runs again were materially diminished with a corresponding drop in income. During 2 weeks in April, he had one run per week where, previously, he would have undertaken approximately three trips per week. Operators of outside carriers' trucks, which he first noticed on Company property during the last week in April and throughout May and June, took trips that idled Company drivers had been taking to Ohio, Michigan, New Jersey, Florida, Alabama, western Tennessee, Kentucky and Indiana. In comparison to a corresponding period during the preceding year when Danner had been driving approximately 1,800 to 2,400

miles per week, from the last week of April through June 1989, Danner averaged about 600 miles a week. Accordingly, his projected annual earnings, when compared to the previous year, were reduced by $10,000 to $11,000.

Driver Robert Gwyn Wyatt explained that while Holly Farms always had used outside contractors to haul its products, before the March election, such contractors had been used to haul Company surplus when there was more freight than Company drivers could handle. However, within 3 weeks to a month after the election, Holly Farms changed its policy to give the bulk of its freight hauling to outside carriers and the situation, from Wyatt's standpoint, thereafter worsened. While Wyatt did not

retain his pay stubs, he recalled that, after the election, his weekly earnings were down by $300 to $400 from what they had been done during the Unions' then-recent campaign.

Driver Harden Branscome observed that from about 2 weeks after the March election, and, increasingly, "to get really bad during the summer," Holly Farms expanded its use of outside carriers. Outside carriers' trucks received more runs than did the Company's drivers. Accordingly, Branscome's pay stubs show that his gross income for the first 9 months of 1989, from January 1 to September 16, was nearly $3,070 less than for the same time frame for the preceding year.

T. R. Hayes and Hester gave similar testimony about the Company's increased use of outside trucks and its impact on them. Hayes related that when he returned from a run before the March election, he would notice three or four contractors' trucks in the yard. After the election, he saw from 10 to 15 such trucks daily while Hester spotted 20. Not only did this contribute to a reduction in Hayes' gross income in the first 9 months of 1989 by more than $4,900 from the same period the year before, but that, even when Hayes did get work, the situation created inconvenience. When returning from a run before the election, Hayes readily could find space within the drivers' room to do his paperwork. However, after the

election, the room was so filled with outside drivers that he had no room and he had to do his paperwork at a truck stop before going on to the Company's premises.

Hester's gross earnings during April 1989 were $1,815 less than for the same month in the preceding year.[184]

David G. Hayes[185] testified for the Respondents that, in March 1988,

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[184] The above diminutions in drivers' earnings from 1988 to 1989 were not caused solely by decreased work from subcontracted freight hauling. As noted, during 1988, Holly Farms had taken certain other actions to reduce the pay of long distance drivers. These steps included the elimination of pallet pay and the reduction of holiday and of waiting time pay.

[185] Hayes, who had held positions of increasing responsibility with Holly Farms since joining that Company in 1977, became operations manager of Holly Farms' transportation division in 1987, and that division's vice-president on June 1, 1988. Effective September 24, after Tyson assumed control, Hayes became eastern division manager, Tyson Transportation.

about a month after becoming Holly Farms' president, Blake Lovette decided to reduce delivery costs by making substantially greater use of outside carriers, thereby de-emphasizing and reducing the Company's truck fleet.

On March 18, 1988, about 9 months before the start of the Unions' campaign, Hayes sent a memorandum with five attachments to his then-immediate superior and predecessor as vice-president of transportation, Odell Whittington, Jr. This document reported the results of a survey of conditions at the Company's Temperanceville, Virginia, facility and set forth information pertinent to replacing the Company-owned fleet with outside carriers. The detailed memo-

randum enumerated various considerations which, although directly related to the logistics of the Temperanceville facility, were of more general applicability. Hayes, in his memorandum, weighed the use of outside carriers over Company-owned trucks with respect to Company control over deliveries;[186] the costs of deliveries;[187] the percentage of Holly Farms' customers who would accept deliveries only by Holly Farms' drivers;[188] and the fact that the shortage of cooler space inside the Temperanceville plant and at other Company facilities made necessary the use of Company-owned refrigerated trailers for storage, reached certain conclusions and made certain recom-

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[186] Holly Farms, in this regard, could exercise greater disciplinary control over its own drivers, making recurrent infractions less likely. However, when outside carriers' drivers did not fulfill established Holly Farms requirements, the contractors could be compelled to pay only monetary penalties which, over time, added up without satisfactorily addressing basic problems.

[187] One cost referenced in Hayes' memorandum is that Holly Farms, in operating its own trucks, paid for round trip deliveries while outside carriers charged only for one way deliveries. This was somewhat offset in that outside carriers, in billing Holly Farms, would factor in their costs in deadheading (returning without freight). Another cost factor was off-loading. This would occur when an outside truck was not available at a Holly Farms plant when perishable product was scheduled to be loaded. In such cases, it would be necessary to first load the product into refrigerated Company-owned trailers and, when the outside truck appeared, to off load from the Company trailers onto the outside carriers' trailers. As indicated in Hayes' memorandum, off-loading was not beneficial because it tied up the loading dock, caused additional labor expenses and, occasionally, resulted in product damage.

(continued...)

[187](...continued)

[188] The survey reported in Hayes' memorandum that 14.1 percent of Temperanceville loads were necessarily delivered by Holly Farms' drivers because, if Company drivers were not available, the customers involved would have to be separately persuaded to accept delivery by an outside carrier. This was because Company drivers, more appreciative of the customers to the Company's business, established relationships and tried harder to meet the customers' requirements.

mendations. Hayes concluded that the argument as to whether Company drivers or outside carriers would do a better job always would exist because both could get the Company's product to the market on time. However, he noted that Company drivers could be controlled while outside carriers could not; that the results of customer relations and costs from failure by an outside carrier's driver were much worse; and that while Company drivers could be dealt with and problems terminated; the services of an outside carrier could only be eliminated, creating a need to find a replacement. Nonetheless, Hayes concluded that the cost and capital savings from increased use of outside carriers made such a process viable

and he recommended a series of measures to put such a scheme into effect. These included gradually eliminating the Temperanceville-domiciled tractor fleet as dependable carriers can be found.

After completing his March 18 memorandum, Hayes discussed that document with president Blake Lovette, who expressed the desire to pursue increased use of outside carriers while de-emphasizing the use of Company-owned trucks. Accordingly, between March and May 1988, Hayes, as directed by Lovette, prepared an annual operating plan for various Holly Farms' locations showing projected quarterly savings on outside carrier usage during the Company's coming June 1 through May 31 fiscal year.

At the time the operating plan was developed, Holly Farms was using its own trucks to make approximately 80 percent of its deliveries and outside carriers for the remainder. Projecting gradual diminution of the use of Company-owned trucks at Holly Farms complexes during each quarter of the Company's fiscal year, Hayes anticipated appreciable savings as the percentage use of outside carriers commensurately was gradually increased.

To make the projected operating plan a reality, Hayes prepared a written plan of action, dated May 26, 1988, and sent the then-outhaul manager, Barry Wood, to each of the Holly Farms' Virginia locations where Wood reviewed the 1989 projected operating plan with the respective dis-

patchers, listened to their problems, on occasion met with outside carriers' representatives and secured the lead dispatchers' commitment to the plan. Additional steps were taken and Wood obtained local commitments for reductions of tractors and trailers at Temperanceville and Glen Allen by June 20, 1988. Hayes conveyed the results of Wood's Virginia trip so Lovette in a June 15, 1988, cover memorandum to Wood's more comprehensive report.

On June 1, Hayes succeeded Odell Whittington, who had retired as vice president of the transportation division on June 1. That month, the first reductions in the Company's fleet were made. Four tractors were eliminated and four drivers were laid

off from Glen Allen; eight tractors and four drivers were taken from Temperanceville; and, at Wilkesboro, four tractors but no drivers were eliminated.

Hayes suffered a heart attack on June 16 and did not return to work until August, part-time, and full-time in September. Whittington, recalled from retirement to substitute for Hayes, instead of continuing to reduce the size of the fleet, began to reverse that process. Further fleet reductions did not occur until after Hayes' return. By memorandum, dated July 11, 1988, from Blake Lovette to Whittington and Hayes, issued in Hayes' absence, Lovette stated that his view that Holly Farms had too much power equipment and that it

was being under utilized. Lovette requested a brief report on weekly power equipment utilization with a view to moving from the then-current 98,000 miles/year level usage to 130,000 miles/year. He also requested a plan to reduce the Company's tractor fleet by about 30 power units.

Hayes described transition-delaying problems experienced in obtaining appropriate carriers. These included difficulties in hiring carriers willing to run out of certain traffic lanes in order to enable Holly Farms to get better coverage in areas it served around the country; in finding carriers that met insurance guidelines; and in obtaining carriers that would drop off refrigerated trailers

on the Company's lot before arrival of the tractors, thereby adding to the Company's storage capacity, which was in short supply at the plant. Hayes also cited his own inexperience.

The next fleet reduction occurred in January 1989, with the elimination of two tractors and two drivers' jobs.[189] In May, the following further reductions were made:[190] Harrisonburg and Glen Allen, respectively —four tractors retired and four

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[189] Hayes admitted to first learning of the Unions' organizing campaign among the Company's transportation department employees on December 23, 1988.

[190] The Company initially had proposed the May reductions to the newly-certified Unions in March, but delayed implementing them until May because the Unions had delayed this response. The parties agree that Holly Farms, before Tyson assumed control, had bargained in good faith on the matter of increased use of trucking contractors and related reductions in the Holly Farms fleet.

drivers laid off; Wilkesboro—six tractors retired and approximately four drivers laid off.[191]

Company records reveal that, from the weeks ending July 30, 1988, through July 15, 1989, Holly Farms used outside equipment for an average of 16 percent of its delivery runs. During the first 35 weeks of that period, from the week ending June 30, 1988, through the week ending March 25, when the Board certified the Unions as bargaining representative, Holly Farms' use of outside equipment averaged 14.5 percent. In the 15 weeks that followed, this figure increased to an average of 18.9

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[191] Although the Company had planned to lay off a total of nine Wilkesboro drivers, attrition had reduced the number of necessary layoffs.

percent—an averaged increase since the certification of 4.4 percent.[192]

Hayes, in a June 7 memorandum to Pete Lovette, Holly Farms' treasurer,[193] outlined a plan for upgrading the Company's current outside carrier group to provide improved levels of service and timeliness of deliveries; to increase the number of available outside carrier power units to the plants; and to decrease the amount of off-loading between Company and outside trailers, and to achieve other purposes.

Blake Lovette explained that factors causing increased reliance on outside carriers during 1988 and 1989

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[192] As noted, in mid-July, Tyson assumed control of Holly Farms.

[193] As noted, Pete Lovette formerly had headed the transportation group.

were: (1) that Holly Farms' costs per mile were higher than the entire industry average and, in many cases, the product could be hauled more cheaply by contract carriers than by use of Company-owned equipment; (2) that Holly Farms' attempts at running its equipment on additional revenue (loaded) miles resulted in tying up the Company's equipment for longer periods so that, with the same number of trucks, fewer were available in which to haul chickens; (3) and that certain tractors were sold and not replaced in accordance with Holly Farms' stated objective of eventually hauling about 65 percent of its own product in Company-owned vehicles and using independent contractors to haul the remainder.

Since, as noted, the Company's refrigerated trailers also were used for additional storage at the plants, their numbers were not affected by these reductions.

Hayes explained that factors determining whether loads would be carried by outside contractors as opposed to Company-owned trucks included the volume of product loads to be delivered; the availability of outside carriers, as affected by seasonal considerations and by holidays; the presence of Company equipment which had to be kept moving; and the availability of carriers to go to the required areas. It was particularly necessary to use Company carriers when business was slow or when outside carriers were not accessible.

Holly Farms also preferred to use its own trucks on trips when backhauls were indicated.

Hayes testified that by reducing its fleet and using outside carriers, Holly Farms was able to lower its costs, although deliberately trading off some Company service capability. He explained that the cost-efficiency in increased use of outside carriers was exemplified by the practice of other companies in that industry with whom Holly Farms then competed. For example, Perdue Foods hauled half its deliveries on its own trucks and contracted the rest. Valmac Industries, a Tyson subsidiary where Blake Lovette earlier had been president, and Conagra, Inc., a large food company with a 9 percent share in the domes-

tic chicken market, did not use their own vehicles, while Tyson hauled only about 30 to 35 percent of its own product on their own trucks.

In agreement with the General Counsel, I have found above that, before the March representation election, various Holly Farms officials repeatedly made unlawful threats to long distance drivers that the Company would close its transportation department, contract its hauling to outside carriers and take away its employees' jobs if they chose the Unions to represent them—in sum, that the Company had threatened that it would do precisely what it is now charged with having done. However, in application, the weight of the credible evidence, supported by sub-

stantial documentation, shows that Holly Farms' increased use of contract carriers after the March representation election actually was consistent with long-term plans and policies that had been conceived in detail and which had commenced well before the start of the Unions' organizing campaign, and also that its actions in this regard were consistent with the practices of other employers competing in the same industry. The Company's increased use of contractors, therefor, was based on a demonstrated business need to become competitive in its delivery costs, rather than on its well-established desire to defeat the Unions. It further is noted that after the Unions were certified as bargaining repre-

sentative, the Company bargained in good faith on the matter of outside contractors and that, during the 15 weeks that followed the Unions' certification, the increase in the use of outside carriers was a controlled 4.4 percent.

Therefor, as the General Counsel has not established by a preponderance of the evidence that the Respondents increased their actual use of contract carriers for hauling in retaliation for its employees' having selected the Unions to represent them, I find that the Respondents did not violate Section 8(a)(1) and (3) of the Act in this regard.

(d) <u>The alleged discriminatory reductions in drivers' earnings —facts and conclusions</u>

The General Counsel contends that by their subcontracting practices, the Respondents discriminated against long distance drivers Gene Hester, Robert Gwyn Wyatt, Harden Branscome, Teddy Ray Hayes and John Danner by dramatically reducing their earnings in early 1989 from what they had been during corresponding periods of the preceding year. This alleged unlawful conduct assertedly followed receipt by Holly Farms' president, Blake Lovette, of a December 29, 1988, letter from union organizer R. W. Brown in which these men and six others, all employed in the Holly Farms transportation department, Wilkesboro, were identified to man-

agement as members of the Unions' in-plant organizing committee. As discussed more fully above, all of the five above-named drivers were unlawfully threatened by Company officials that the transportation department would be closed, that hauling work would be contracted to outside carriers and that their jobs would be lost if the employees selected the Unions to represent them. These employees also were subjected to other unlawful conduct.

The record shows, also as more fully described above, that each of these men were active union supporters and that, after the Unions were certified following the March election, Wyatt attended at least five negotiating sessions as a member of

the Unions' committee. Wyatt, too, as found above, had been subject to threats of retaliation by driver-coordinator John Sloop in the drivers' room in the context of his union activities following his accident while driving on an icy, snow-covered road, and, shortly before that incident, he had turned down Sloop's suggestion that he forego the Unions and join in a committee to negotiate with management.

Pay records show that in January and February 1989, Danner averaged, respectively, $358 and $72.50/week less than during the same months of the preceding year. Wyatt, during those same months, averaged, respectively, about $111.39 and $275/week less than during the same weeks of

the corresponding months of the preceding year. Branscome's pay stubs showed that for about the first 9 months of 1989, his gross earnings were $3,069.37 less than during that period of 1988, while Teddy Ray Hayes' stubs for approximately the same period in 1989 showed gross earnings that were down from the corresponding 1988 interval by $4,916.40. There was evidence of further earnings reductions for Wyatt and Danner in 1989.

While the foregoing facts and figures, in the context of the Respondents' other above-found unlawful conduct affecting these same employees, create suspicion of discrimination, particularly in view of the size of the pay reductions, they do

not prove by an evidentiary preponderance that discrimination, in fact, occurred. The record shows that these five employees were not alone in having been identified to management as active in the Unions' campaign. In a series of four letters, respectively dated December 29, 1988, February 20, 27 and March 6, 1989, to Holly Farms' president Blake D. Lovette, Union organizer R. W. Brown named, including the above 5 men, a total of 52 Wilkesboro employees as members of the Unions' in-plant organizing committee. In that correspondence series, the Unions also so identified 26 Glen Allen employees, 11 Monroe employees, 18 Temperanceville employees and 1 employee at Harrisonburg. As noted, the initial

December letter, in addition to naming the five men asserted as discriminatees, also identified six other Wilkesboro in-plant organizing committee members. The record does not indicate that any of these many other spotlighted union adherents were comparably discriminated against or that the earnings of Branscome, Wyatt, Hester, Hayes and Danner, however, lessened for 1989 as compared to 1988, had been reduced below the compensation for other similarly-situated transportation department employees during the times in question. While these five employees plainly have earned substantially less than in comparison periods, there is no showing that, in their earnings, they were treated differ-

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AUG 4 1995

In The Supreme Court Of The United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFERS, TEAMSTERS AND HELPERS,
et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Volume Three - Appendix to Writ of Certiorari

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ently than were other employees in their category.

Noting too, that I have found above that the Respondents did not violate the Act by its actual, as opposed to its threatened, contracting polices, I find that the Respondents did not violate Section 8(a)(3) and (1) of the Act by using those contracting practices to reduce the earnings of Teddy Ray Hayes, Harden Branscome, Gene Hester, Robert Gwyn Wyatt and John Danner.

D. Events Occurring After Tyson's July 18 Takeover

1. Refusals to bargain concerning drivers-yardmen unit—facts

(a) Bargaining between March - July

On March 24, 1989, following an election in Case 11-RC-5571, the seven above-identified Teamster lo-

cals, herein collectively the Unions, were jointly certified as bargaining representatives for Holly Farms employees in the following unit:

> All driver employees and yardmen at the Employer's Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas, facilities; excluding all office clerical employees, and guards and supervisors as defined in the Act.[194]

Holly Farms and the Unions met in about 12 contract negotiating sessions between April 11 and June. The parties are in agreement that these negotiations were conducted in good

[194] On March 9, 10 and 11, when the election in Case 11-RC-5571 was conducted, there were about 299 drivers in the unit. On September 12, when the General Counsel and Union assert that the Respondents withdrew recognition from the unit, the Respondents employed 209 unit drivers and about 45 yardmen—35 in the eastern division and approximately 10 in the western division.

faith and that at the time of the July 18 stock purchase by Tyson,[195] the parties were continuing to attempt to reach agreement. During these negotiations, attorney Jesse S. Hogg served as chief spokesman for the Company while Bruce D. Blevins, secretary-treasurer of Teamsters Local 391, filled that role for the Union.

At Hogg's suggestion, the parties agreed to reschedule negotiating sessions that had been set for July 10-12 to gain additional time in which to clarify Holly Farms' status and bargaining position as Tyson had successfully bid for Holly Farms' stock and was about to assume control. On

[195] Tyson learned on July 14 that its purchase bid for the purchase for Holly Farms' stock would be successful.

July 18, Hogg contacted Blevins and advised that he would continue as Company spokesman and the parties set August 8, 9 and 10 negotiating dates.

Charles Clark Irwin[196] testified, that 5 years earlier, he had met with Pete Lovette, then-head of the Holly Farms' transportation group and who later became that Company's treasurer. As a result of this meeting, Irwin learned that Holly Farms was losing money, a situation which continued into 1989. Tyson's initial bid for Holly Farms was made around mid-October 1988 and while the acqui-

[196] Irwin, with Tyson since 1978, was Tyson's group vice-president, distribution and commodity purchasing, based at Tyson's headquarters in Springdale, Arkansas. At the time of the hearing, Irwin was responsible for Tyson's transportation and warehousing functions and for all ingredient and commodity purchasing that went into the production of feed at Tyson Foods' 13 feed mills.

sition process continued, in response to an inquiry by Don Tyson, Tyson's board chairman and chief executive officer, as to how Holly Farms' transportation division might be integrated with Tyson and for a projection of the economic result, Irwin and Mike McNeese, Tyson's director of transportation, prepared a projected operating plan, dated January 24, which broadly outlined how the two transportation divisions might be merged.[197]

On July 14 and 15, key Holly Farms management personnel and the representatives of Tyson management group from Springdale, Arkansas, met in

[197] Tyson's acquisition of Holly Farms also included various Holly Farms subsidiaries which, although substantial enterprises, are not germane to this proceeding.

Atlanta, Georgia, for a general introductory meeting and to exchange ideas. During this meeting, the status of Holly Farms' collective-bargaining negotiations with the Unions were discussed as was a document describing Tyson's long haul transportation corporate philosophy and goals, prepared by Irwin 2 weeks before.[198]

No decisions were taken at the Atlanta meeting.

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[198] This documented statement of Tyson's general philosophy for owning and operating its fleet first presented Holly Farms' executives with ideas later put into effect when the Holly Farms transportation division was incorporated into the Tyson transportation system. Briefly, for a number of specified reasons, it was Tyson's purpose to move between 25 to 35 percent of its volume in its own trucks. The Holly Farms group first also learned of the Tyson fleet manager dispatching concept, which will be described below.

(b) <u>The August 8 negotiating session</u>

The Respondents and the Unions met as scheduled on August 8 at a motel in Greensboro, North Carolina. The events of this meeting, jointly attended by 20 Company and Unions' representatives, are not in dispute. Hogg continued to serve as the Respondents' spokesman while Blevins filled that role for the Unions. Hogg announced that the Tyson representatives, at negotiations for the first time, were present for informational purposes. Hopefully, they could answer questions as to the decisions that were to be presented and implemented.

Hogg told the Unions' representatives that Holly Farms was not fully-owned by Tyson Foods, Inc., which had

purchased the entire Company and had taken full control over the Holly Farms' operations. Tyson, having examined the situation, was going to make some changes. The Seguin, Texas, plant, part of Holly Farms western division, was going to be converted from a fresh poultry plant, to be blended into the Tyson operation as a fast food or institutional-type plant. The 14 drivers, members of the Unions' bargaining unit, who were based at that plant would be given the opportunity to work for Tyson. Hogg explained that those drivers would not be employed by Holly Farms but would be dispatched from a central point, not yet established, in northeast Texas.

Hogg announced that the Holly Farms' plant at Center, Texas, the other segment of Holly Farms western division, would continue to be a pressed poultry plant, but would be put into the Tyson operation. Of the 25 Holly Farms drivers domiciled at Center, 18 or 19 would be given the opportunity of working for Tyson and the remaining drivers, in excess of these 18 or 19, would be laid off as Holly Farms drivers, subject to recall as determined during further negotiations.

Both the Seguin and Center drivers would be dispatched from a central point to be established in northeast Texas. Neither group would be required to change their residences. As under Holly Farms, these drivers

could take home their trucks if they lived in the area or, at their option, could leave their trucks at their respective plants.

Hogg announced that Tyson was not going to integrate the eastern operations into Tyson although, if Tyson had so desired, it was Hogg's position that they could. Instead, Tyson was going to operate these eastern operations as the Holly Farms Foods Fresh Retail Division. Hogg emphasized that the Holly Farms' brand name was famous and one which Tyson desired to maintain. However, Tyson did intend to make certain changes with regard to the eastern operation; it was going to reduce the number of drivers and tractors operating in the east. He told the Unions that Tyson

was going to reduce the number of tractors by 47 and was going to reduce the number of eastern drivers by 71.

Blevins, for the Unions, objected to the reduction of eastern division drivers, accusing the Respondents of wanting to have more of its product hauled by outside carriers and less hauled by Company drivers.

Hogg informed the Unions that the facilities to be affected by those reductions would be at Wilkesboro, Monroe and Temperanceville. The Company would add additional tractors to the other Virginia facilities. Hogg also advised the Unions that the Company was withdrawing the proposed 4 percent pay increase during a 1 year contract that Holly Farms had placed

on the table during the June 22 negotiating session and presented a revised proposal that pay remain unchanged during a 1 year agreement. The Unions protested then and at subsequent meetings that the Respondents were making those proposals to pressure and bring hardship on employees who had elected to be represented by the seven Teamster locals.

The parties continued to negotiate contract proposals for the remainder of that session.[199]

(c) <u>The August 9 and 10 negotiating sessions</u>

The Respondents' and Unions' representatives met again on August 9 at

[199] Hogg's announcements to the Unions on August 8 followed instructions he had received from Blake Lovette in furtherance of decisions taken during a July 21 meeting of Tyson and Holly Farms executives at Tyson's Springdale general corporate offices.

the same place and spent most of that day discussing contract proposals.[200]

On August 10, the parties met again. Hogg advised the Unions' representatives that the Center, Texas, drivers who, on August 8, he had said would be laid off as Holly Farms' drivers, would be offered employment with Tyson. They no longer would be Holly Farms' drivers, but would receive their dispatches from Arkansas. The remainder of that session was spent negotiating contract terms.

(d) <u>The August 21 negotiating session</u>

On August 21, representatives for the Respondents and Unions conducted

[200] On August 9, Lankford sent a memo to four supervisors summarizing the above changed operating plans for Texas drivers and requesting that such changes be communicated to the affected transportation employees at Center and Seguin.

another contract negotiating session at the same Greensboro location. Hogg and Blevins again served as the principal spokesman. That meeting also was attended for the first time by Victor De La Fuentes, the business agent for Local 657, San Antonio, Texas, which local had jurisdiction over Seguin, Texas. At that meeting, Blevins stated that it was the Unions' position that the Respondents were eroding the unit by their previously-stated intention of merging the Texas division into Tyson's operations and by reducing the work force in the eastern division while giving the freight to outside carriers. He again accused the Respondents of taking those actions in order to pressure unit employees in retaliation

for their union activities. Hogg denied that these measures were retaliatory and advised that he had been in touch with the powers that be and that they were going to have their program in effect no later than by November 1. By that time, the reductions in eastern division drivers and equipment would be in place. Hogg reiterated that Tyson was going to reduce the number of outbound miles for eastern truck drivers to that they would be hauling products within only a 450 mile radius of their respective terminals. These drivers would not be making backhauls or, if any other party made a backhaul, it would only be of Tyson or Holly Farms products. This would save the drivers some delay time at

pickup points, since they no longer would have to wait for backhaul loads.

Blevins stated that this sizeable reduction in the driver force was not acceptable to the Unions. He asked the Company to reconsider its plans, to maintain the driver force as it was and not to take the Texas employees out of the bargaining unit. The Unions reiterated that these actions were unlawful and were being done in retaliation.

During the August 21 meeting, Blevins asked who would be hauling the product from the Center and Seguin terminals if the Company took the Holly Farms' drivers out and put them in the new facility. Hogg replied that, more than likely, this

would be done by drivers formerly employed by Holly Farms and, on occasion, by a Tyson driver who might come through the area.

Answering Blevins' inquiry as to the seniority status of Holly Farms' western division employees who were being put into the Tyson transportation system, Hogg stated that he would not make any commitment. However, Hogg reassured the Unions that such drivers would not be discriminated against and would be treated as were the other Tyson drivers. When Blevins asked how the Tyson drivers were treated, Hogg replied that they were not there to negotiate for Tyson; they were there to negotiate for Holly Farms. When Blevins pointed out that Howard Baird, the Tyson

Foods' vice-president for industrial relations, was present and that he would know how seniority was applied in the Tyson transportation division, Hogg answered that Baird was not there to negotiate, but only to provide information or answer questions that Hogg might have.

(e) The August 22 negotiating session

On August 22, essentially the same parties met again at the Greensboro motel. On that occasion, Hogg advised the Unions that the Company was going to go ahead with its plans to reduce the work force in the east and that, in a couple of days, it would be sending out letters to eastern employees and would be laying off the 71 drivers. The Unions again unsuccessfully asked the Respondents not

to lay off these people because of the asserted unavailability of freight since that freight otherwise would be hauled by outside carriers.

Hogg, however, answered Blevins' question of the day before concerning the Texas drivers' seniority. Hogg assured the Unions that Tyson did recognize the seniority and vacations of the Holly Farms drivers who would be integrated into the Tyson operation, both for long distance drivers and for the shuttle (local) drivers.

During the August 21 and 22 sessions, the Respondents did provide the Unions with requested copies of the Tyson pay and benefits plans and advised what these plans were. The Unions had been told during the August 8 meeting that, when integrating

the Holly Farms drivers into the Tyson transportation system, all drivers would be paid in accordance with the Tyson pay plan.

When Blevins asked what would happen to Holly Farms' yardmen after integration, he was told that the Tyson system did not use yardmen to hook up or to unhook trailers from tractors.

The parties spent the remainder of the August 22 session negotiating contract terms and agreed to schedule additional meetings on September 12 and 13.

However, the Respondents' decisions, announced to the Unions during the August 8 through 10 meetings and further discussed later that month, to the effect that Holly Farms would

only be partially merged into Tyson; that the Holly Farms eastern division would be reduced by 71 drivers and 47 tractors; and that a 450 mile outhaul limit would be applied at Holly Farms east, with an elimination of backhaul, never actually were effectuated. Between the August 21-22 sessions and that scheduled for September 12, the Respondents gradually decided that there would be substantially more backhaul work available than previously had been projected. This revised estimate arose from new information, encapsulated in an Au-

gust 24 memorandum by David Hayes[201] to Blake Lovette.[202]

Accordingly, at a September 11 meeting in Wilkesboro, of senior Tyson executives and those who had been with Holly Farms, a decision was finalized to fully integrate the total Holly Farms transportation division—east and west—into Tyson Transportation because of three flaws in the original plan: (1) it was impossible to predict how many loads from a given facility would be within the 450 mile range and how many would be outside; (2) during the 2 months

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[201] Hayes, vice-president of the Holly Farms' transportation division, as noted, became eastern manager of Tyson Transportation on September 24.

[202] Lovette, who until the takeover had been Holly Farms' president, in August, was president of Tyson's Fresh Retail Division. This title later was changed to vice-president.

that had lapsed, it had become evident that there would be sufficient freight available to make unnecessary the announced reductions in eastern personnel and equipment; (3) and since Tyson already had taken over Holly Farms, it was decided that it was best simply to fully integrate the two operations. Hogg was directed to announce the Respondents' revised position to the Unions at the negotiating session scheduled for the next day.

(f) <u>The September 12 negotiating session</u>

On September 12, as scheduled, the parties met at a different Greensboro motel. The Unions were represented by Blevins and members of their negotiating committee. Hogg; Irwin; Hayes; Howard Baird, Tyson vice-

president and director of industrial relations; Bill Travis, Tyson's director of personnel; and Mike McNeese, in charge of the Tyson transportation system, appeared for the Respondents. As before, Hogg and Blevins served respectively as spokesmen for the Respondents and Union.[203]

Hogg opened the meeting by advising the local Unions that before going further, he had an announcement to make. First, he had some good news for the Unions. The Respondents had made a survey and discovered that there was more backhaul freight available than was previously known.

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[203] The events occurring at the September 12 meeting essentially are undisputed and, as described; synthesize the testimony given by witnesses from each side.

Because of this, the Company was not going to lay off 71 drivers, as initially proposed. However, the Respondents were going to integrate the Holly Farms eastern division drivers, as well as the Texas (western) division drivers into the Tyson transportation department. For all intents and purposes, these drivers would become Tyson drivers and would be paid under the Tyson pay scale.[204] However, they would continue to receive the Holly Farms fringe benefits they then were getting as provided in the merger agreement between Holly Farms

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[204] Under the Tyson pay plan, drivers earned different mileage rates based on their service time with Tyson, on a progression of 0-3 years. The Unions were told that Holly Farms drivers being merged into Tyson would receive credit for their Holly Farms service in tenure of their placement in that progression. As will be discussed, Tyson's payment per mile to its drivers was less than Holly Farms' mileage rate for its eastern drivers.

and Tyson. However, the Holly Farms drivers, after integration, would have the same pay scale as the Tyson transportation drivers. Hogg reiterated that there no longer would be Holly Farms transportation drivers—they all would become Tyson drivers. He declared that Tyson would be sending letters to all Holly Farms drivers, including the 71 eastern drivers previously notified that they were being excessed, announcing their opportunity to work as Tyson drivers.

Blevins asked when the Respondents were going to take these actions. Hogg repled that the Company was going ahead that morning with its plans as put on the table. The Unions then requested a caucus.

After caucusing for approximately 20 minutes, Blevins advised the Respondents' representatives that the Unions had serious disagreement with their proposed plans and requested answers to certain questions. Blevins asked Hogg who had made the decision to integrate the entire Holly Farms transportation division into the Tyson transportation system. Hogg replied that he did not know, not having been there, but did not feel that Blevins would get this information. In response to Blevins' question as to when the decision had been made, Hogg stated that he did not feel that Blevins was entitled to that information but that the decision had been made between the time of their last meeting on August 22

and the present September 12 session. When Blevins asked the reason for the decision, Hogg advised that the Company wanted to have more of its freight hauled by outside carriers and wanted to be able to fill up the empty miles with backhauls using Tyson drivers, including those to be integrated into Tyson Transportation. The Unions asked for any documents used or material data related to the making of these decisions. Hogg stated that he would take this request under advisement but, in his opinion, Blevins was not entitled to this information and would not get it.

Blevins also asked Hogg for a copy of the referred-to merger agreement between Holly Farms and Tyson. Hogg

again told the Unions that he did not think that they were entitled to this and might not get it. As of the hearing dates, the Unions had not received a copy of the merger agreement, although as will be discussed, a relevant provision from that document was sent to the Unions in later correspondence.

When Blevins asked if it was the Respondents' intention to integrate any of the other Holly Farms divisions or classifications into Tyson, Hogg replied not to his knowledge. In response to Blevins' question as to what the Company would do with the yardmen,[205] Hogg answered whatever

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[205] As noted, at the time, there were about 35 yardmen in the Holly Farms eastern division and about 10 in the western division.

was feasible. Replying to another inquiry from Blevins, Hogg advised that Holly Farms' local drivers also would be offered jobs with Tyson.

Hogg repeated that the Company representatives were not there to negotiate about where the drivers would go, but about the impact. Blevins responded that the Unions' representatives were not going to negotiate that day on impact because they did not feel it appropriate and they also did not have the necessary information that had been requested. Blevins asked if the Company was refusing to bargain with the Unions. Hogg answered, no, the Company was willing to bargain concerning the impact of this decision but was not

willing, at that time, to bargain concerning its decisions.

During that meeting, Hogg informed the Unions that the Respondents' plan was to no longer have a Holly Farms transportation division; that that division was going to be integrated into Tyson Transportation; and that, therefor, the Unions no longer represented the employees.[206] However, it is undisputed that neither Hogg nor any Company representative told the Unions in so many words that Holly Farms was withdrawing recognition as of September 12. However, as Irwin attested, the Company's statement of

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[206] As Tyson Transportation, before the takeover, had approximately twice the number of drivers than had Holly Farms, if, as argued by the Respondents, the merger of the two transportation systems was lawful, the Unions no longer would have majority support in the combined group.

its willingness to continue to recognize and bargain with the Unions related solely to bargaining with respect to impact of the Respondents' announced decisions. Blevins' response was angry. He told the Respondents' representatives that they would bargain with the Unions; that the Unions had been elected and certified to represent the drivers and that the Unions would not go away. As the meeting ended, Blevins told Hogg that the Company did not have a right to decide to bargain only over the impact of its decisions. Hogg answered that this was a legal matter and suggested that Blevins have his attorney contact him. Blevins reiterated his protests that the Company could not make those decisions,

and that he was going to defend and represent the unit people at whatever costs. He promised that the Unions' attorney would contact Hogg.

There were no further discussions concerning a new contract that day, and September 12 was the parties' last negotiating sessions.

(g) <u>The September 12 job offer to unit drivers</u>

On September 12, at the conclusion of the negotiating session, Hayes, over his signature as vice-president of the Holly Farms Foods, Inc., Transportation Division, on that Company's stationery, sent copies of the following letter to all Holly Farms drivers:

> Tyson Foods, Inc., has decided to assume all long distance transportation functions and responsibili-

ties related to Holly Farms operations.

All current Holly Farms Transportation Division drivers are to be offered employment with Tyson Foods, Inc. Transportation Department, as Tyson drivers, under the Tyson Pay Plan. Fringe benefits currently in effect will be continued for Holly Farms drivers who accept employment with Tyson, as prescribed by the merger agreement. Tyson will recognize length of service at Holly Farms, as required under Tyson policies.

Please contact John Sloop on or before September 22, 1989, for your processing to become a Tyson Foods employee.

(h) Direct negotiations with unit drivers

In accordance with the parties' stipulation, I find that after the September 12 negotiating session and mailing of copies of the above letter to drivers offering them jobs with

Tyson, Tyson and Holly Farms management and personnel representatives met with small groups of the long distance drivers. At these gatherings, the Tyson representatives explained the terms and conditions of employment applicable to Tyson drivers, under which the recipient drivers would be working if they accepted the offer. These meetings began on September 12 after the negotiating session had ended and continued.[207]

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[207] Irwin and Hayes testified that these meetings with Holly Farms drivers continued through September 22. As described by Lankford, at meetings he attended with David Hayes and Howard Baird, Tyson's vice-president for industrial relations, after Hayes had explained the Tyson system, its work rules, procedures and, generally, how things would be when integration took place, Baird would answer questions. At each of these meetings, questions arose as to what would happen to the Unions. Baird's reply was that, once the Holly Farms and Tyson transportation departments were integrated, the Teamsters Union no longer would have a majority of employees in the department they

(continued...)

(i) <u>The alleged constructive discharges of 47 unit drivers</u>

In accordance with the parties' stipulation, I find that the 47 long distance drivers named below were among the 209 drivers to have received David Hayes' above September 12 letter offering them employment with Tyson under new terms set by Tyson and that, for reasons consistent with the testimony of long distance drivers Donald Ray Kanupp, Fred Royal and Curtis Eastridge, these 47 drivers rejected the employment terms set forth in that letter and did not continue to work for Ty-

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[207](...continued)
represented and, therefor, would no longer be the employees' representative.

son.[208] The other drivers who received the September 12 job offer accepted.

The 47 drivers who refused the September 12 offer, alleged as constructively discharged in violation of Section 8(a)(1), (3) and (5) of the Act, were:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller

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[208] As noted, when the September 12 offer was made on Holly Farms stationery, rather than that of Tyson as the prospective employer, Tyson had been in control for approximately 2 months.

Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

Eastridge testified that, after receiving his copy of the September 12 letter as an enclosure with his paycheck, on September 13, he spoke to Lankford by phone. Lank-

ford, in answering Eastridge's questions, told him that if he worked for Tyson, Eastridge would be expected to be on the road for from 10 days to 2 weeks at a time[209] and that he would receive Tyson wages, not Holly Farms wages. Eastridge replied that the Unions represented him and that he was not signing on to work for Tyson at a lower wage rate than what he then was earning. Lankford told Eastridge that if he did not sign, he would not be called to work after September 22. Eastridge emphasized that he wanted to make clear for unemployment compensation and other purposes that if the Company refused to call him to work, it would be ter-

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[209] Holly Farms drivers had been average 3 to 4 days on round trip.

minating his employment—he was not quitting. Lankford answered that the Company would look it differently; that he was quitting.

Kanupp testified that, after receiving the letter, on September 20, he phoned driver-coordinator John Sloop, to whom responses were to be directed, and declared that he was not going to sign the letter and take another decrease in pay. Sloop suggested that Kanupp stop by his office and talk to him. When Kanupp did so later that day, he again told Sloop that he could not sign the letter to take another decrease in pay. When Sloop suggested that he try it, Kanupp said no.

Royal, too, received the September 12 employment offer. He related

that during the evening of September 22, dispatcher Rex Grider[210] called and told Royal that if he did not sign the paper by midnight, he no longer would be called to work. When Royal asked if he was fired, Grider told him, no, it would be a voluntary quit. Royal stated that he had not quit, but Grider told him, "We will not call you anymore."[211]

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[210] The parties stipulated that Grider, while not a supervisor, had acted as a Respondents' agent within the meaning of Section 2(13) of the Act in making the September 22 telephone call to Royal.

[211] Seven or eight of the 47 drivers who declined work at the specified terms, including Hester, Branscome and T. R. Hayes, had retrieved the initial acceptances from David Hayes and John Sloop, having explained that they did not want to be away from home as long and wanted to be able to shower in a motel. They were concerned that Tyson did not reimburse its drivers for motel rooms.

(j) Continued refusal to furnish the merger agreement; parties' positions; withdrawal of recognition from the Unions

After the September 12 negotiating session, the parties, in a series of letters to each other during which the Unions continued to seek a copy of the Respondents' inter sese merger agreement first requested on September 12, explicated their respective views on the disputed bargaining obligation as it related to the drivers-yardmen unit. In this correspondence, a summary of which follows, the Respondents also withdrew recognition from the Unions.

By letter, dated September 15, to Respondents' attorney Hogg, Merl E. Kelly, chairman of the Unions' negotiating committee, asked for various items of information, including the

Tyson Foods/Holly Farms merger agreement,[212] previously requested orally by Blevins during the September 12 negotiating session. In his letter, Kelly stated that the date sought was necessary to enable the Unions to perform as bargaining agent.

Hogg, in his September 20 reply, after defending against various statements by Kelly, rejected the Unions' request for all documents on grounds that it did not appear that any of the requested information related to legitimate bargaining objectives and that the Respondents did not believe that the Unions were en-

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[212] Since the Tyson Foods/Holly Farms merger agreement was the subject of the only refusal to bargain allegation based on failure to furnish requested information, it is not relevant to refer to the other items sought.

titled to the requested documents. Hogg reiterated his willingness to discuss the Unions' entitlement to such information with their attorney.

By letter, dated September 19, to Don Tyson, Tyson's chairman and chief executive office, Springdale, Arkansas, and to Lankford, Union secretary-treasurer B. D. Blevins put the Respondents on notice that the drivers and yardmen in the certified unit, having been required in the September 12 letter to sign a statement accepting employment with Tyson or be considered to have resigned their employment, had not waived their rights under the Act by having signed such a statement. In his letter, Blevins also demanded that Tyson meet with the Unions to negotiate a

collective-bargaining contract covering the employees in the drivers-yardmen unit, and to continue the employees under their then-current employment terms until such a contract was reached. Finally, Blevins demanded that the Respondent bargain with the Unions over both the decision to move the employees from Holly Farms to Tyson, and as to the effects of that decision. Blevins set forth the Unions' understanding that Tyson and Holly Farms were now the same Company for all purposes and that the Unions would treat them as such.

The first response to Blevins' above letter came from Howard D. Baird, Tyson vice-president, industrial relations, in correspondence dated September 26. Baird defended

the Respondents' requirement that the Holly Farms drivers sign a statement that they wished to be employed by Tyson Transportation as that Company's means of determining who was interested so as to enable a decision as to whether it would be necessary to hire additional drivers. Baird concluded his letter with the following paragraph:

> With regards to your demands to meet with you to negotiate an agreement for these drivers, we must refuse in as much as they will be part of the considerable larger unit with entirely different scheduling, terminal locations, hauling distances, and management. As such, it is our feeling that a bargaining obligation does not exist. We must also refuse to meet and bargain with you over the decision in as much as it is entirely within our prerogative and due to changing conditions and economic needs. With

> regards to the effect of that decision, you are advised by the Holly Farms negotiating representative that they are prepared to negotiate on such effects which, as I witnessed, you refused.

Blevins, by September 29 correspondence to Hogg, reiterated the Unions' September 12 position that the Respondents were obliged to bargain with the Unions over any decision to move Holly Farms drivers into Tyson Transportation, as well as the effects of such decision or transfer. He repeated the Unions' request that Holly Farms, Tyson and/or both meet with the Unions to negotiate a collective-bargaining agreement covering the employees represented by the Union and that the current terms and conditions of employment be continued until a contract had been signed.

Finally, the Unions restated their request for the information, including the merger agreement, sought in Blevins' September 15 letter.

In correspondence, dated October 10, Hogg replied to Blevins' September 29 letter point by point. Hogg noted, contrary to the Unions, that Holly Farms was the only Company that recognized Blevins' unions; that Hogg had represented only Holly Farms, not Tyson, in bargaining with the Unions concerning the drivers and yardmen; that nobody but Holly Farms was obliged to bargain with the Unions concerning the employees in question; and that the Tyson management personnel who had attended bargaining sessions had been there out of courtesy and to provide any needed

information to Holly Farms negotiators.

In his October 10 letter, Hogg disagreed with Blevins that Tyson did not have a right to integrate the transportation operations without bargaining with the Unions over the decision to integrate as well as over the effects of that decision on the unit employees. He noted that Holly Farms, in fact, had offered to bargain with the Unions concerning the effects of impact of that decision. Hogg rejected the Unions' request to continue the Holly Farms' transportation employees under the terms and conditions of employment that had existed as of September 12 on the ground that, if Holly Farms were to recognize an obligation to continue

that status quo, such recognition, in effect, would deny Tyson's right to integrate the operations.

Hogg noted that the Unions, on September 12 and since, had not asked Holly Farms to continue contract negotiations, as distinguished from impact negotiations, and that if the Unions had requested continuing contract negotiations with Holly Farms until the integration was implemented, Hogg would have agreed. Hogg concluded his letter with the following offer to the Unions:

> 1. Holly Farms will meet with [the Unions] and negotiate in good faith with regard to the wages, hours and working conditions of the employees in the [drivers-yardmen] unit described in NLRB Case No. 11-RC-5571, until such time as it is abundantly clear that

> the Holly Farms transportation operation has been fully integrated into the Tyson Foods transportation operation.
>
> 2. These negotiations will include impact or effects negotiations at your pleasure.
>
> 3. These negotiations are to take place upon a clear understanding that Holly Farms is dealing with you and Tyson Foods is not.
>
> 4. No contention is to be made later on that either Holly Farms or Tyson Foods has waived the right to refuse to negotiate based on their position that a legally adequate integration has already taken place. Otherwise stated, Holly Farms' participation in negotiations is not to be argued as showing that either Holly Farms or Tyson Foods admits that the 11-RC-5571 unit remains intact at this time.

In Hogg's October 10 response to Unions attorney J. David James' September 28 letter, he distinguished certain cases that James had cited in support of why the Respondents should furnish the requested merger agreement. Hogg did this, in part, by pointing out that in one of the cited cases, the Employer representative's explanation of the terms of the there-requested agreement, had been found unreliable and, therefor, unlawful, because of that representative's lack of personal knowledge of the content. Hogg, however, noted that that was hardly true in his case. While continuing to deny any obligation to furnish merger agreement data, Hogg ended his letter by

quoting the following provision from the merger agreement:

> Article V. Certain Covenants
>
> Section 5.8. Employee Plans. The parent agrees [that] following the Effective Time the Surviving Corporation will provide, for a period of two years after the Effective Time, employees of the Company (excluding for purposes of this Section 5.8 employees covered by collective bargaining agreements or who are members of a collective bargaining unit or labor union) with employees benefits following the Effective Time which are no less favorable in the aggregate than the employees benefits provided under the plans and arrangements for such employees by the Company as of the date hereof.

James' October 17 reply to Hogg noted his disagreement as to what the law required in the way of information from the Respondents. He noted the Unions stood by their earlier

request for all of the information including, but not limited to, a complete copy of the merger agreement and that the Unions were supported in this by the complaint that had been issued by the Board's Regional office. The Unions, to facilitate this process, stated their willingness to enter into a confidentiality agreement with the Company.

Also on October 17, James sent a second letter to Hogg pursuant to Blevins' request that James answer Hogg's October 10 letter to him. In this letter, the Unions expressed their disagreement with Hogg's characterization that they did not wish to engage in impact bargaining. The Unions reiterated their readiness to bargain with Tyson and Holly Farms on

all issues, including the decision to transfer the drivers to Tyson and the impact of that decision, but reaffirmed their need for the requested information to enable the Unions to bargain effectively. James questioned the seriousness of Hogg's previous offer to negotiate for a collective-bargaining agreement only until such time as integration was implemented, asking who would determine when Holly Farms Transportation had been so fully integrated into Tyson Transportation as to end contract negotiations. James also challenged certain Company positions, including Hogg's representation that Holly Farms would negotiate only if it was clearly understood that Holly Farms, alone, was dealing with the

Unions and that Tyson was not. He asserted that both Tyson and Holly Farms were obliged to bargain.

In his October 23 reply to both of James' October 17 letters, Hogg reiterated the Respondents' basic positions. Responding to the statement in James' letter that the Unions did not wish to engage in impact bargaining until it received the remaining requested information, Hogg pointed out that the information sought related to details of the process that had resulted in the decision to integrate. As Hogg did not believe that the decision to integrate was bargainable, he did not believe that the Unions were entitled to information as to how that decision had been made. Hogg, therefor, would not ad-

vise that the requested information be provided.

Hogg, also agreeing that it would be "a little silly for the Unions to continue contract bargaining during the time when the integration process was taking place," set forth in his view that the integration process already had been completed. Hogg again asserted corporate duality, declaring that Holly Farms insisted that Tyson, not itself, had the right to integrate these transportation operations and, therefor, had the right to employ the Holly Farms drivers under Tyson's wages, hours and employment conditions. The issue of whether the unit employees could be integrated into Tyson was not bargainable. Hogg concluded by reiterating that he had

not represented Tyson in bargaining with the Unions because Tyson did not have any bargaining relationship or obligation with the Unions. Hogg noted that it did not make any difference whether James agreed with the Respondents' position on that point as far as Holly Farms' willingness to bargain is concerned.

(k) Comparison of Holly Farms and Tyson pay and benefits plans

Under the Tyson pay plan, long distance drivers earned less for comparable effort than under Holly Farms. While, under the Holly Farms pay plan, announced December 16, 1988, all its eastern division drivers were be paid at a basic rate of 28.25 cents per single mile driven, at Tyson, the mileage rate for drivers with 0 to 3 years seniority grad-

ually increased on a scale ranging from 20.5 to 25.5 cents per mile. While Holly Farms allowed $6.95/hour breakdown pay, to be paid beginning 2 hours after the driver called in his breakdown report and continuing until he again began to move or for a maximum of 8 hours, the Tyson plan did not include such an allowance. Layover pay at a rate of $45 was made available by Holly Farms for delays at customers' premises starting at the 17th hour past a driver's scheduled delivery time, while Tyson provided layover pay of $50/day when unloaded and available for dispatch by noon local times. While Holly Farms allowed $8/stop and $12/pickup pay, Tyson afforded $5 for pickups/drops; no drop pay for straight loads, and a

multi pickup/drop arrangement payable at $10 for the first two stops and $15 thereafter. No stop pay, as such, was mentioned in the Tyson plan.[213]

Holly Farms also provided its employees with a benefits schedule which included, as noted, 8 paid annual holidays at $55/day; paid funeral leave and jury duty;[214] paid vacations ranging in length from 1 week after 1 year of service, increasing to a maximum of 4 weeks after 15

[213] The smaller number of Texas-based drivers in the Holly Farms western division received a lesser rate of 25 cents/mile with the other employment terms the same. However, unlike Tyson drivers, who started at 20.5 cents/mile and worked up to 25.5 cents/mile only after 3 years' service, the Holly Farms western division drivers received the 25 cent/mile rate from the start of their employment.

[214] Jury duty was compensated as the difference between $55/day and what the employee received for serving on the jury.

years with the Company; paid group insurance. including life, accidental death and dismemberment, weekly disability benefits, hospital and surgical expense, major medical, dental and vision care assistance plans,[215] and a retirement plan.

Except that Tyson afforded its driver 7 annual paid holidays at $45 /day, with no reference to paid jury or funeral leave, fringe benefits available to Tyson drivers are not clearly defined in the record. However, the record does establish that one of the terms of the merger agreement, which was included at the insistence of Holly Farms' board chair-

[215] After 3 months on the job, Holly Farms employees had the option of purchasing the same insurance for their dependents as the Company provided to them.

man, was that Holly Farms job benefits should continue intact for former Holly Farms eastern division employees in Tyson's service for 2 years after the merger.

Although the drivers' mileage compensation rate, schedule of other payments, such as stop and pickup pay, and job benefits were superior under Holy Farms than under Tyson, the Respondents, nonetheless, argue that the former Holly Farms drivers actually earned more money annually while working for Tyson because Tyson Transportation, more than had Holly Farms, required that each driver spend longer periods on the road accumulating compensable mileage. Holly Farms' drivers had averaged 3 to 4 days away from home on each round

trip, driving a weekly average of 1,800-2,000 miles, generally making deliveries at a given location and then returning, preferably with a backhaul load. This was because the Holly Farms transportation division was operated as a delivery arm of that Company's poultry business. Tyson Transportation, on the other hand, considered itself an independent Company profit center in the freight business and, accordingly, actively pursued hauling opportunities wherever available. So, while a Tyson driver, like a Holly Farms driver, initially would depart to deliver his Company's product to one or more customers, the Tyson driver, after completing those deliveries, but before returning, would be fur-

ther dispatched to pick up and deliver various other types of freight, running as many as six "legs" to the overall journey and averaging approximately 2,500 miles/week. Tyson drivers averaged 10-14 days on the road per trip.

(1) Arguments concerning the refusals to bargain

The General Counsel and Union contend that Tyson, as Holly Farms' successor, was obliged to recognize and bargain with the Unions with respect to the employees in the certified drivers-yardmen unit; that the Respondents failed to meet this duty by unilaterally announcing the above changes on August 8 concerning integration of the western division drivers into Tyson transportation and the unilateral reductions in the eastern

division by the layoff of 71 drivers and removal of 47 tractors;[216] by the September 12 announcement that the entire Holly Farms transportation division would be merged into Tyson Transportation under unilaterally changed employment terms for affected employees; by refusing to bargain about the decisions to make these changes in the unit during the certification year; by unilaterally withdrawing recognition from the Unions as bargaining representative; and by refusing to furnish the Unions with a copy of their merger agreement setting forth the Respondents' under-

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[216] While, as noted, these initially announced changes affecting the eastern division were later rescinded in favor of other unilaterally-imposed changes, this was not done until after the drivers to be excessed had been notified for some time.

standing as to job benefits for unit employees. These parties also assert that the Respondents had violated Section 8(a)(5), (3) and (1) of the Act by constructively discharging the above-named 47 employees for having declined to work under the unilaterally-changed terms and conditions of employment; by unilaterally announcing the end of the Holly Farms retirement program; and by the actual merger of unit employees into Tyson Transportation that followed, with changed employment terms.

The Respondents, whose bargaining positions in good measure were set forth in the foregoing exchanges of correspondence, in part, argue that elements of the asserted constructive discharges were not met since the

Respondents had not intentionally sought to force its employees' resignations because of their union activities by making conditions so difficult as to render continued employment intolerable. In this regard, the Respondents contend that the proffered employment conditions, the same as already applied to Tyson's 550 drivers, represented the going industry pay rates and were not discriminatory punitive or unpleasant as indicated by the fact that the overwhelming majority of the drivers who had received the September 12 letter had elected to accept and to maintain their employment relationship with Tyson. The Respondents further argue that even if the employment terms offered by Tyson had been less desir-

able, there is no evidence that the 47 disaffected employees would have been influenced by this in their decisions, as there was no separate showing that these employees had studied the Tyson pay or had had it explained to them by the Unions.

The Respondents further contend that only Holly Farms, not Tyson, had a duty to bargain with the Unions, while Tyson had a right to make the changes announced and invoked.

Immediately after the September 12 negotiating session, the Respondents began a comprehensive program to quickly and completely integrate Holly Farms into Tyson. In this process, both Holly Farms' transportation and production facilities were absorbed.

(m) <u>The integration of Holly Farms transportation division into the Tyson transportation system</u>

After the September 12 meeting with the Unions, Tyson officials Irwin and McNeese returned to that Company's Springdale, Arkansas, headquarters and immediately drafted a rough outline of a plan to integrate the two companies in applicable time frames. They believed that Holly Farms' smaller western (Texas) division could be completely integrated by October 2, with implementation by that date of Tyson's fleet manager's dispatching concept and the start of work on a new Texas terminal away from the former Holly Farms Seguin and Center plants and the Tyson Carthage plant, which could service all three production facilities.

In reviewing Holly Farms' eastern division, Irwin and McNeese discussed establishing a terminal at Statesville, North Carolina, centrally located between Wilkesboro and Monroe, since a facility, so located, could handle tractors from Temperanceville and Richmond (Glen Allen).

In implementing these plans, a Carthage, Texas, terminal was opened in an existing building on October 16 under the Tyson system with a Tyson operations manager and a fleet manager who had been with Holly Farms. As no suitable facility was available in Statesville, a new terminal, instead, was opened in Wilkesboro, near the airport, 1-2 miles out of town in a building that had been owned by Holly Farms.

Before the merger, Holly Farms which principally was a producer of fresh poultry and related products, observed a product ratio of about 60 percent fresh to 40 percent frozen. Tyson, predominantly a frozen poultry producer, had a reverse product ratio. As of September 12, Holly Farms owned approximately 170 tractors, of which around 120 were used for long hauls and 50 were for local use. Around 220 drivers, including extra board,[217] were assigned to these vehicles.

As of September 12, Tyson owned and operated 400 to 450 tractors, including 400 long haul and 40 to 50 shuttle (local) tractors. Including

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[217] Extra board drivers did not have regular tractors assignments and filled in for absent full-time drivers.

extra board and team operations,[218] approximately 550 drivers were used to operate those vehicles.

As noted, before the merger, Holly Farms and Tyson Foods had different role views of their respective transportation departments. Tyson saw its transportation system as a profit center within the corporation, while Holly Farms transportation was an adjunct to its production operations. Accordingly, while the Tyson transportation group considered itself in the freight business, picking up and carrying cargo of various kinds to locations far removed from its trucks points' of origin, as opportunity allowed, the Holly Farms group was more

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[218] Team operations, differently applied by Holly Farms and Tyson, will be discussed below.

influenced by plant management and existed principally to move that Company's products from its production facilities to customers.

While the drivers in the Holly Farms' eastern division transportation group ultimately reported to David Hayes as vice-president for transportation, the drivers in that Company's western division reported to a division vice-president for the production in Center, Texas, and were controlled, not by the transportation group but by the production group. Both Hayes and the western division vice-president reported to Blake Lovette, Holly Farms' president. However, even though the eastern division drivers reported to the transportation group, they still were sub-

ject to appreciable influence by Company production officials, and plant and grow-out managers could decide how many tractors could be domiciled at their plant facilities.

(i) Changes in the dispatching system

Under the Holly Farms system, dispatchers were based at each of the Company plants. Head dispatcher, Curtis (Bob) Absher, was based at that Company's Wilkesboro headquarters complex and lead and regular dispatchers were located at outlying plants. Long distance drivers were hired at the respective plants. All orders for products were taken at Wilkesboro and were then forwarded to the relevant plants to be filled. The dispatchers based at those plants would assign loads to Company-owned

trucks, often on a first-in, first-out basis. At Wilkesboro, the then-outhaul manager, Barry Wood, as deemed necessary, would book the outside carriers. This would be done at outlying facilities by the lead dispatchers. The Wilkesboro and Center locations had groups that would solicit return trip backhaul cargos destined for the immediate areas of Holly Farms' plants.

In absorbing the Holy Farms trucking operation, Tyson basically extended its own system. In the post-integration period, after September 22, the dispatchers were removed from the plants and, in their place, fleet managers with authority to assign drivers, ultimately were situated at Tyson's four terminals, at

Springdale and Russellville, Arkansas; Wilkesboro, North Carolina; Oxford, Alabama; and Carthage, Texas.[219] All sales orders were received at the Springdale central sales office which determined which facility would fill a given order. The director of traffic's group[220] in Springdale, which first received the order from the sales department, would determine which load was to be delivered from which terminal, based principally upon geographic location with respect to the plant and the customer. The director of traffic

[219] Including the production facilities obtained from Holly Farms, these 4 terminals served production plants or complexes in 33 municipalities scattered throughout Virginia, North Carolina, Georgia, Alabama, Arkansas, Missouri and Texas.

[220] Bruce Clark, who before the merger was Tyson's director of outside transportation, became director of traffic.

then would send the order to the operations manager heading the selected terminal[221] who would allocate the trucks to service the total number of orders. The operations manager then would convey the sales order to a given fleet manager at the terminal who, in turn, would assign the load to the driver,[222] telling the driver where to pick up the loaded trailer and the destination. Where the terminal was not situated to handle an order, the fleet manager, through his

[221] At the time of the hearing, the operations manager's position for North Carolina, in Wilkesboro, was unfilled and David Hayes who had become Tyson Transportation's eastern division director, filled both positions.

[222] The number of fleet managers at a Tyson terminal varied according to the size of the terminal. Filling roles comparable to Holly Farms dispatchers, they were responsible for the operation of groups of 50 to 60 tractors and the drivers to whom those vehicles were assigned.

operations manager, would so notify the Springdale operations manager who then would advise the director of traffic to book the services of an outside carrier,[223] which he did through subordinate outside truck coordinators. Terminal operations managers had authority to hire, discharge and discipline. Fleet managers only could discipline.

Under Holly Farms, the same dispatchers at various plants, who dispatched the long distance drivers, also dispatched the local drivers, who usually made deliveries within a 150 mile distance of where they were

[223] In this regard, the terminal operations manager was functionally comparable to Holly Farms' lead dispatchers, based away from Wilkesboro who, as noted, engaged outside carriers for their surplus loads. At Wilkesboro, that service had been rendered by the then-outhaul manager, Barry Wood.

based. Under Tyson, local drivers, now designated shuttle drivers, all were dispatched by a Wilkesboro-based shuttle manager who was part of the transportation department. These local drivers will be separately considered below.

The parties are in accord that, following merger, there was substantial integration of loads and they stipulated that, during the week of October 2, former Tyson drivers and tractors handled 187 Holly Farms trailer loads and that former Holly Farms drivers and tractors handled 42 trailer loads of Tyson products.

The fleet manager system was introduced at Wilkesboro on September 23, following extensive training by Tyson representatives from Spring-

dale, between September 12 and 22. From that introduction date, drivers were expected to call the Wilkesboro fleet managers for assignment. Between October 12-22, Holly Farms' lead dispatchers were offered positions with the Tyson Transportation management group. One of these, Roy Myers, a lead dispatcher at Temperanceville, accepted the shuttle manager's position in Wilkesboro. Two others rejected, respectively, the operations manager's job and a fleet manager's position at Wilkesboro. The two fleet manager jobs in Wilkesboro ultimately were taken by former Holly Farms dispatchers.

Supporting the fleet managers at Wilkesboro were clerical employees who had been on staff at Holly Farms

as payroll clerks with experience in routing, payroll functions and clerical skills. Redesignated as dispatch coordinators, they and the fleet managers began to access the Tyson computer system, which had been brought to Wilkesboro. Basically, two dispatch coordinators working with each fleet manager spoke daily to each driver, providing routing and fuel price information, assisting with logs and making computer entries of all data concerning the drivers' payroll and cash advances.

Unlike the first-in/first-out assignment system used by Holly Farms under which the first driver to return to the terminal would be the first to be assigned the next load, Tyson's fleet managers attempted to

equalize mileage among the 50-60 drivers assigned to them, thereby more evenly distributing the drivers' earnings. Accordingly, drivers who had just completed the longest runs would be offered the shortest runs. However, in making these assignments, Tyson tried to recognize driver preferences where all things were equal. Accordingly, some drivers liked to stay within a 500-800 mile radius of their terminals while others preferred 1,500 to 1,800 mile runs. Some leaned toward the multi-drop less than trailer load (LTL) deliveries associated with frozen product runs.[224] If the available drivers

[224] Since frozen product was more expensive than fresh, customers were less likely to order a full trailer load of the frozen and so LTL loads often had product for sever-
(continued...)

were sufficient in number to make the necessary deliveries and if all had accumulated the hours, fleet managers tried to observe the drivers' preferences in making assignments.

Holly Farms had utilized separate dispatchers at each plant for outhaul and backhaul. Accordingly, if a Holly Farms driver was preparing to make an outbound product delivery, he would get his assignment from the outhaul dispatcher at his plant location. If such driver was picking up a backhaul load, he would call a different dispatcher depending upon his geographical location at the time and

[224](...continued)
al destinations before the trailer was emptied, necessitating more time on the road. Tyson's outbound LTL freight, at 40 to 50 percent of total deliveries, contrasted with Holly Farms' 15 to 20 percent.

he also would call a different dispatcher in the backhaul group. Holly Farms did as the drivers on outhaul deliveries to call the central Wilkesboro office and some would. However, drivers who were not domiciled at Wilkesboro would call their home location.

Under Tyson Foods, the driver called one fleet manager who gave him his assignment whether outhaul or backhaul in whatever part of the country he might be.

(ii) Backhauling

Holly Farms had operated a centralized backhaul department which solicited and booked freight for return runs. Summaries of that Company's records show, however, that during the fiscal years ending May 31,

1987, and 1988, respectively, roughly 41 or 42 percent of Holly Farms return runs came back empty (deadheaded) and did not result in revenues. David Hayes explained that this high deadheading rate had been due to Holly Farm's primary use of its own equipment to haul its own product to market and that the backhaul program had not been effective because of that Company's reluctance to leave its outbound traffic lanes to obtain backhaul freight.

However, under Tyson, outbound trucks, after completing deliveries, were directed to go wherever necessary to obtain additional freight without regard to the nature of the freight or as to where it went as long as additional revenues resulted.

Accordingly, while long haul drivers for Holly Farms might be gone an average of 4 days per trip, Tyson drivers who might be additionally routed several times, could be on the road for an average of 10-14 days. Tyson drivers also could expect to be sent out again 2 days after they had returned.[225]

Before the merger, as noted, Holly Farms drivers had averaged 1,800-2,000 miles/week, but at the time of the hearing, with additional backhauls, they were driving 2,350 to

[225] For use in backhauls, Tyson had a 48 states general commodities operating authority from the Interstate Commerce Commission (ICC), granting both general commodity and contract operating authority. This allowed Tyson to haul anything between states on the continental United States except household goods and explosives. Since the merger, Holly Farms' ICC motor carrier number was discontinued, all operating authority was combined and all trucks operated under Tyson's authority.

2,500 miles/week. This brought them up to within 100 to 200 miles/week of what the former Tyson drivers were averaging, and it was anticipated that with additional experience with the Tyson system by fleet managers and drivers alike, that that gap would be closed.

Tyson's backhaul operations were centralized in Springdale in a group under the solicitor who, in turn, reported to the sales manager. This group, by telephone, constantly solicited backhaul loads across the country to find freight sufficient to refill trucks that were emptying in broad, divers regions. Fleet managers advised these solicitors where their trucks were emptying and the solicitor's group would attempt to

obtain loads to match the available trucks. When such a match of load to truck was made, the fleet managers would not have discretion to further assign specific trucks to handle specific loads unless, at a given location, the same numbers of trucks and loads were available.

(iii) Yard personnel

Under Holly Farms, yardmen were transportation department employees who reported to the dispatchers. Yardmen dropped incoming trailers at specified places, cleaned the trailers' interiors; and, after unhooking the trailers, parked the tractors at specified places. When outbound trailers were loaded, yardmen hooked the trailers to the tractors and drove the tractors across the Compa-

ny's scales. They also fueled tractors, installed load locks, loaded stabilizer bars to stabilize loads and closed and sealed trailer doors. Their duties included checking the slack adjusters on the brakes beneath trailer, checking the equipment and replacing light bulbs as necessary.

Under the Tyson system, yardmen were assigned to the plants rather than to the transportation department, and had fewer duties. Under Tyson, drivers, not yardmen, were responsible for hooking trailers to tractors and for weighing and fueling their tractors. When drivers return, they, rather than the yardmen, were required to unhook the tractors from the trailers, to fuel and to park the tractors.

Tyson had transferred the yardmen to individual plant locations by around November 1. At the plants, their duties were to move and to empty trailers; to partially or fully load them in and out of plant loading facilities. Yardmen continued to wash the trailers, inside and out. They precooled trailers before loading; insured that enough pallets were available at the loading dock; partially or fully loaded trailers, moving them in and out of the plant loading facilities; secured the load inside the trailers, put in load locks and sealed the trailers. They moved trailers to the pickup areas so that the drivers could hook the trailers onto their tractors and depart.

Under Tyson, the yard personnel reported to the transportation coordinators, all of whom were former dispatchers transferred to plant payrolls. These transportation coordinators merely expedited loads and ensured that the paperwork was done. While as dispatchers under Holly Farms, they had supervised groups of drivers domiciled at their plants, they no longer participated in load selection, assignments of loads to drivers or other driver supervision. Transportation coordinators were so named because they were responsible for coordinating production with transportation functions.

Tyson continued to employ the same number of yardmen at Wilkesboro as had Holly Farms.

(iv) Shuttle (local) drivers

Under Holly Farms, local drivers were a part of the transportation division. Eleven Holly Farms trucks were based in Wilkesboro and six trucks in Monroe were used to make deliveries of 100 to 150 miles radius to customers in North Carolina. If all local delivery trucks were being used, additional local deliveries would be made by long distance trucks.

Under Tyson Foods, the local drivers were redesignated shuttle drivers and the number of shuttle deliveries dramatically increased. This was because Tyson products were sent to a cold storage facility in Charlotte,

North Carolina, from where they were shipped to customers.[226]

Tyson added more local drivers and extended the local delivery distance to about 250 miles one way. At the time of the hearing, Tyson had a total of 31 shuttle drivers. Of these, 4, for the first time, were based in Richmond; 2 in Temperanceville, 9 in Monroe and 16 in Wilkesboro. Shuttle drivers were part of Tyson Transportation, and all were centrally dispatched from the shuttle department at the Wilkesboro terminal.

Establishment of the shuttle department with drivers at all applica-

[226] Under Holly Farms, permanent cold storage facilities were not available, but such facilities occasionally were used for overflow when sales were poor and it was necessary to freeze product.

ble locations, was completed at the end of November.

(v) Plant and truckload integration

The parties stipulated to integration of plant product and of deliveries from an early date. Accordingly, the parties agree that during the week of September 25, Tyson and Holly Farms began to load their respective trailers with each other's loads. Tyson's plant at Shelbyville, Tennessee, which previously produced frozen poultry was turned over to the Holly Farms fresh division, but continued also to produce Tyson brand products. Since September, former Holy Farms plants now producing Tyson label products included those at Monroe, Richmond, Wilkesboro and Center. These also continued to produce Holly

Farms products. The Holly Farms Food Service operation in Wilkesboro, since the merger, produced more Tyson label products, using different formulations than before.

During the week of September 25, total loads of Tyson and Holly Farms products, excluding transfers, movi[illegible] on Company-owned trucks were 1,276 of a total of 2,527. Tyson trucks hauled 107 Holly Farms loads and Holly Farms trucks handled 35 Tyson loads. This mix thereafter increased and the Tyson freight rating system was put into effect.

(vi) Quality control and sales

The Tyson quality control system was put into effect at the Holly Farms roast chicken plant in Wilkesboro, where whole chickens and parts

were fully-cooked and prepackaged for sale.

The quality control system changed in that, where quality control managers, under Holly Farms, would answer to Blake Lovette, under Tyson, they were responsible to a quality control vice-president in Springdale.

The sales departments also were correspondingly integrated.

(vii) Work rules

Prior to the merger, Holly Farms had published its own work rules. David Hayes testified that, since the takeover, Tyson also had published work rules affecting Holly Farms employees, implemented around October 1. These new work rules were distributed to the 24 new employees hired since the takeover. Hayes,

however, was uncertain as to whether the new rules also were given to existing employees. He did not believe that Holly Farms employees at the time of the takeover were informed of the new work rules.[227]

(viii) Team assignments

To comply with the Interstate Commerce Commission restriction that no driver may drive for more than 10 consecutive hours, Holly Farms, when time restraints on a delivery required more than 10 hours of straight driving, would assign a team made up of a regular and an extra board driver to limit the amount of uninterrupted driving either would have to

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[227] While the Tyson work rules may not have been distributed, they were applied. In February 1990, two drivers were terminated for refusing a dispatch.

do. Such team assignments were not permanent, but were made for one trip. The Holly Farms system of using two drivers on an outhaul for trips that were longer than one driver could take under regulations, diminished driver earnings because mileage, the principal component of driver pay, was paid at a lower rate for team assignments. Accordingly, the more team operations a driver ran, the less his earnings.

Tyson, to comply with this regulation, used permanent teams, usually consisting of a married couple. Tyson did not follow Holly Farms' practice of matching up temporary teams of regular and extra board drivers and, where a load was going to take more than 10 hours to deliver and

time was critical, Wilkesboro would call Springdale and ask for a permanent team. If such a team was not available, Wilkesboro would inform the sales department that such a team was not available and ask that they inform the customers that the product would be delivered late. To avoid such late deliveries, Tyson, where possible, would seek more lead time.

(ix) Uniforms and Company logos

Holly Farms did not require that its management representatives and drivers wear uniforms, but, uniforms were mandated for Tyson managerial personnel and encouraged for drivers. Management representatives wore khaki shirts and trousers. The Company furnished these shirts with the Tyson logo over the right breast pocket,

and the executives' first names were stitched over the left breast pocket.

Tyson drivers, too, including those from Holly Farms, were furnished khaki shirts with the Tyson logo. Their own first names did not appear on the shirts. The individual provided his own trousers. For drivers, the Company also provided a coat and, occasionally, other over-wraps such as jackets. Driver use of uniforms was not mandatory because of laundering problems while on the road.

With respect to equipment, Irwin testified that there would be no change in the earlier system where Holly Farms had had its own tractor colors and logo. However, it was decided that new equipment all would

be purchased with the Tyson colors and logo on tractors and trailers but that the Respondents would not go through the expense of repainting all existing equipment. In this regard, the Respondents, at the time of the hearing, were in the process of replacing the 45-foot trailers in the fleet with larger units to provide greater cubic capacity.[228]

(x) Control of labor relations

Under Tyson Foods, the Tyson/Holly Farms direction of labor relations has been centralized in Springdale under Irwin, Baird and McNeese.

(xi) Safety

Before Tyson, Holly Farms' safety program was administered through the

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[228] Holly Farms has not done its own vehicle purchasing for long haul transportation since September.

Wilkesboro corporate safety and security office. Under Tyson, the safety program was administered from Springdale by a manager of safety and personnel who reported to McNeese, the transportation director. The Holly Farms corporate safety program was discontinued. Since his September 25 appointment as manager of safety and personnel at Wilkesboro, John Sloop was responsible for local safety activities. Cross-training was provided and Springdale safety personnel visited Wilkesboro to inspect all relevant areas and to ensure that drivers' files, including logs, were completed and in proper order, as required by law.

(xii) Tyson transportation department since July 18

Although Tyson was in control at Holly Farms from July 18, that Company made few, if any noticeable changes in Holly Farms' operations until after September 22. In that initial period, virtually all of Holly Farms' managerial, supervisory and employee personnel were retained in essentially their former positions, although managers were absorbed into the Tyson organization with Tyson job titles. Employees continued to work under the same terms and conditions of employment, producing and hauling the same product to the same customers as though the takeover had not occurred. It was only after the September 12 negotiating session that steps were taken to bring about the

above-described changes. Although, as noted, the Respondents, during the August 8-10 negotiating sessions, had notified the Unions that the two Texas locations, comprising the Holly Farms western transportation division, would be merged into Tyson Transportation, much did not occur in that regard affecting western drivers until October.

On October 16, a new Tyson terminal was opened at Carthage, Texas, the terminals near the plants at Seguin and Center were closed, and the 18 drivers at those terminals and their equipment were relocated to Carthage. About 10 trucks beyond those that had been moved from Center and Seguin also were transferred to the Carthage terminal. While the

Center and Seguin plants continued to be those nearest to the new Carthage terminal, that facility was the terminal geographically closest to Tyson plants in Waldron, Grannis and Nashville, Arkansas; Broken Bow, Oklahoma; and Dallas, Texas, none of which have attached terminals.

At the eastern division, after some initial transitional shuffling of transportation department personnel in buildings within the Wilkesboro complex, a new terminal opened during the first half of December in what had been a Holly Farms building located near the Wilkesboro airport, approximately 2 to 3 miles from the Wilkesboro complex. This new Wilkesboro terminal served the former Holly Farms plants at Glen Allen (Rich-

mond), Temperanceville and Harrisonburg,[229] Virginia; and Monroe and Wilkesboro, North Carolina, which plants no longer had attached terminals. However, the former Holly Farms drivers who had been domiciled near those plans when they did have terminals were not required to move although they, thereafter were dispatched from Wilkesboro. In this regard, Tyson excepted its former Holly Farms drivers from its rule requiring that drivers live within a 50 mile radius of their terminals.

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[229] As of September 12, the former Holly Farms fresh plant at Harrisonburg, which also had produced fast foods, such as Kentucky Fried Chicken and some IQF production, was assigned to the Tyson Foods Service Group, which sold further-processed, institutional-type poultry to hotels, restaurants, hospitals and schools. As a result of this redesignation, the Harrisonburg plant's product was redistributed so that only 40 to 50 percent went to traditional Holly Farms customers, while the rest went to Tyson customers.

Although Irwin testified to a Company intent that all future drivers be hired from and live near the Wilkesboro terminal, the records shows that of the 23 drivers hired at Wilkesboro since September 22, 3 were permitted to live near Monroe and 1 in the vicinity of Glen Allen. The rest of the new hires were domiciled in the Wilkesboro areas.

The record indicates, at least with respect to the eastern division, that while, since the autumn of 1989 all drivers have been dispatched by fleet managers at Wilkesboro, rather than, as before, by plant-based dispatchers, Tyson's Transportation, Eastern Division, essentially was under the same supervision as had been the Holly Farms eastern trans-

portation division. David Hayes who, as Holly Farms transportation vice-president had overseen the eastern division, remained in place in essentially the same role as manager of the eastern division of Tyson Transportation, except that he reported to Springdale. Curtis (Bob) Absher, formerly Holly Farms head dispatcher at Wilkesboro, under Tyson, became manager of outside transportation, booking independent carriers as needed and replacing the outhaul manager, Barry Wood, who previously had performed that function at Wilkesboro for Holly Farms. Roy Myers, the shuttle manager under Tyson, had been brought to Wilkesboro from a lead dispatcher's position in Temperanceville, another Holly Farms east loca-

tion. The fleet managers and dispatch coordinators with whom the drivers continued to work, formerly also had been part of the Holly Farms eastern division transportation dispatch system, and the new Wilkesboro terminal primarily serviced the Wilkesboro, Monroe, Harrisonburg, Temperanceville and Glen Allen plants, locations that had comprised the Holly Farms eastern division transportation system. From the time Tyson took control on July 18, the clear majority of the Tyson's Wilkesboro and Carthage-dispatched drivers had been Holly Farms drivers who continued to drive their assigned tractors to perform the same functions and to exercise the same skills as under Holly Farms.

Until January 1, 1990, what had been the Holly Farms transportation department continued to operate under the Holly Farms Interstate Commerce Commission (ICC) operating authority because of the time period required to enable Tyson to reissue numbers for and to relicense the tractors. However, since that date, all operations have been conducted under Tyson's operating authority.

(xiii) Changes in the computer systems; methods of payment; employee benefits

Before Tyson, Holly Farms, at Wilkesboro, used an IBM computer system, while Tyson operated with a Sperry Univac system located at Springdale. On September 22, the information in the Holly Farms IBM

computer concerning routing systems,[230] drops, deliveries and other related areas, were entered onto the Tyson corporate Sperry Univac system, and the Sperry system, which was brought to Wilkesboro, was used to facilitate the central controls exercised by Tyson over the Wilkesboro operation.

However, for 2 years after the Tyson takeover, the Respondents continued to use the Holly Farms IBM system for paying the eastern division drivers and for other former Holly Farms eastern division employees. Payroll information for the former Holly Farms east drivers, entered into a Sperry terminal in Wilkesboro, was

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[230] Computerized routings replaced the route books previously prepared and issued to Holly Farms drivers by John Sloop.

transferred to the mainframe computer in Springdale where the necessary deductions and net pay were computed. This information was transferred back to the Wilkesboro IBM system where the paychecks actually were cut, and the drivers paid by Holly Farms checks. This procedure, which applied only to the Wilkesboro and other eastern division locations, but not to the western division, was followed in accordance with the provision in the Tyson/Holly Farms merger agreement that Tyson continue Holly Farms job benefits for former Holly Farms employees for 2 years. This required continued use of the old Holly Farms computer system in order to facilitate maintenance of those separate benefits records. When the

2 year period of continued benefits expired, Tyson anticipated discontinuing those benefits and, thereafter, preparing payroll and paychecks for all on the Springdale Sperry Univac computer, from where the checks would be sent for local distribution. Tyson job benefits also would become applicable.

2. Refusals to bargain concerning the drivers-yardmen unit--discussions and conclusions

(a) Successorship

The General Counsel and Union argue that Tyson, as Holly Farms' successor, was required to bargain with the Unions as to the drivers-yardmen unit because Tyson, when it took control on July 18, had not exercised its right, existing at the time, to hire or retain Holly Farms' unit em-

ployees under new terms and conditions of employment. Instead, for about the first 2 months, Tyson had left those employees' employment terms essentially as under Holly Farms. Accordingly, with Tyson, Holly Farms' former employees had continued to work at the same locations, under the same pay scales and other terms and employment conditions, doing the same work using the same equipment, serving the same customers, reporting to the same supervisors, as before the takeover. The General Counsel and Unions argue that Tyson's bargaining obligation was triggered on July 18, when it began to operate the former Holly Farms business with an unchanged employee complement, and therefor, employed a

substantial and representative complement of former Holly farms employees. The General Counsel and Unions further assert that, in spite of the changes that have taken place since September 22 with respect to Tyson's efforts to integrate the transportation and other operations of the two Companies, the drivers-yardmen who had comprised the Holly Farms transportation bargaining unit remained identifiable, although relocated, and had not been accreted into the larger Tyson transportation system.

The Respondents, in turn, assert that Tyson's above-described operational changes had resulted in such complete integration of Holly Farms transportation into the much larger Tyson group as to have destroyed the

drivers-yardmen unit and vitiated the Unions' status as majority bargaining representative even though the Unions were still in their certification year. In so contending, the Respondents emphasize the changes that have occurred and distinguish between Holly Farms' bargaining obligation to the Unions and that of Tyson. The Respondents' position, as noted, is that Holly Farms was obliged to bargain with the Unions only concerning the effects of those changes until such time as integration of the transportation employees' unit was completed, but that, since Tyson never had been bound to recognize and bargain with the Unions, that Company had had no responsibility to furnish

the merger agreement or, otherwise, to bargain.

In Nephi Rubber Products Corp., et al.,[29] the Board restated its criteria for determining the existence of a successor relationship as follows:

> (1) Whether there has been a substantial continuity of the same operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same service.

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[29] 303 NLRB No. 19, sl. op. 4, fn. 6.

Also in Nephi Rubber Products Corp., supra,[232] the Board noted that:

> In its review of the principles governing successorship in Fall River Dyeing Corp. v. NLRB,7 the Supreme Court stated: "In conducting the analysis, the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'"8 The District of Columbia Circuit Court of Appeals likewise has explained:
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> > In determining whether the requisite "substantial continuity of the employing industry" exists, courts and the Board typically look to a variety of factors. . . . However, we have also made clear that [t]he essential inquiry is whether operations as they impinge on union members, remain essentially the same after the transfer of ownership. [Citation omitted.] The focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit. As recently noted by the Ninth Circuit Court of Appeals, "the touchstone remains whether there was an 'essential change in the business that would have affected employee attitudes toward representation.'"9

The Board has articulated the same concept: "In the successorship situation the events must be viewed from the employees' perspective, i.e., whether their job situation has so changed that they would change their attitudes about being represented."10

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[232] Id. at sl. op. 4-5.

7 482 U.S. 27 (1987).

8 Id. at 43, quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973).

9 Food & Commercial Workers Local 152 (Spencer Foods) v. NLRB, 768 F.2d 1463, 1470 (D.C. Cir. 1985, quoting NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985), quoting Premium Foods v. NLRB, 709 F.2d 623, 627 (9th Cir. 1983). The court's decision in Spencer

Foods, which reversed the Board's dismissal of the 8(a)(5) allegation in that case, subsequently was endorsed by the Board. See Sterling Processing Corp., 291 NLRB No. 30 fn. 9 (September. 30, 1988).

10 Derby Refining Co., 292 NLRB No. 112, slip op. at 3 (Feb. 10, 1989), enfd. sub nom. Coastal Derby Refining Co. v. NLRB, 915 F.2d 1448 (10th Cir. 1990).

Here, noting the parties' above stipulation that, on or about July 18, Tyson had purchased a controlling interest in the stock of Holly Farms, making Holly Farms a wholly-owned subsidiary, and that, since that date, Holly Farms, Inc., and Holly Farms Food Service, Inc.,[233] have been engaged in the same business operations at the same locations

[233] Holly Farms Foods, Inc., and Holly Farms Food Service,Inc., both are fully-owned subsidiaries of Holly Farms Corporation which, as noted, is a wholly-owned subsidiary of Tyson Foods, Inc.

selling the same products to substantially the same customers, and having as a majority of their employees, employees who previously were employees of Holly Farms, in the context of the fact that for the first 2 months thereafter, nothing had changed for those who had been Holly Farms employees, I conclude that there had been no significant occurrence from the standpoint of unit employees affecting their desire for continued representation by the Unions. I, therefor, find that as of July 18, Tyson became Holly Farms' successor and, accordingly, became obligated to bargain with the Union as of that date for the existing drivers-yardmen unit. In so finding, I note that while the above stipulation refers,

by its terms, to the initial continued operation of Holly Farms' business by Holly Farms as an entity distinct from Tyson, that, in fact, was not the case. The record shows that, upon Tyson's assumption of control, key Holly farms executives almost immediately were absorbed into the Tyson organization. Blake Lovette, Holly Farms' president, became, first, president, and then a Tyson senior vice-president and general manager of Tyson Foods Fresh Retail Division; Everett (Skipper) Solomon remained in charge of North Carolina operations, including the Wilkesboro complex, but now for Tyson; A. Gerald Lankford, Holly Farms vice-president for human resources, became manager of human resources, Tyson Foods Fresh

Retail Division; and David Hayes, Holly Farms vice-president, transportation, continued as manager of Tyson Transportation's eastern division. While, as noted, these executives remained in Wilkesboro, with essentially the same duties as before, they performed their duties as part of the Tyson management team and in accordance with Tyson's dictates. When Blake Lovette, just before the August 8 and September 12 negotiating sessions, when major changes affecting the drivers-yardmen unit were announced to the Unions, instructed attorney Hogg as to what to tell the Unions, he did so in consultation with other Tyson officials. Also, since all drivers-yardmen unit personnel were kept on the payroll under

their existing wages, hours and other terms and conditions of employment, I find that, as of July 18, Tyson/Holly Farms employed a substantial and representative complement of former Holly Farms employees.[234]

These findings are consistent with the following discussion of NLRB v. Burns International Security Services, Inc.,[235] in Fall River Dyeing & Finishing Corporation v. NLRB:[236]

> . . . . although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." 406 U.S. at 294, ... We further explained that the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring. . . . Thus, to a substantial extent the applicability of Burns rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of §8(a)(5) is activated. This makes sense when one considers that the employer intends to take advantage of the trained workforce of its predecessor. [Emphasis supplied]

In summary, consistent with the above authority, I find that, since Tyson did not exercise its right to set initial terms and conditions of employment for retained Holly Farms employees different from those previ-

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[234] See NLRB v. Jeffries Lithograph Company, et al., 752 F.2d 460, 464 (C.A. 9, 1985), enfg. 265 NLRB 1499. Also see Memphis-Truck & Trailer, Inc., et al., 284 NLRB 900, 909.

[235] 406 U.S. 272, 80 LRRM 2225 (1972).

[236] 482 U.S. 27, 125 LRRM 2441, 2445-2446 (1987).

ously afforded by Holly Farms, and, as these employees' employment terms and duties during the first 2 months after Tyson took control remained the same, they became established and not subject to unilateral changes. I have found above that nothing occurred during this initial period under Tyson that could have so impinged upon unit employees as to have affected their interest in continued representation by the Unions. I, therefor, conclude that Tyson's obligation, as successor, to bargain with the Unions for the drivers-yardmen transportation unit was activated on July 18 when it acted to maintain the same business as Holly Farms and to retain in place a substantial and

representative complement of that Company's employees.

(b) Accretion

In reaching the aforesaid conclusions, I am not persuaded by the Respondents' argument that the integration of Holly Farms transportation into Tyson after September 22 resulted in the accretion of the existing drivers-yardmen unit into the Tyson transportation system with a result that that unit no longer existed. Rather, in agreement with the General Counsel and Unions, I find that unit continued as separately identifiable.

As noted in Reliable Trailer and Body, Inc.:[237]

> The Court, in NLRB v. Security Columbian Banknote Co., 541 F.2d 135, 140

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[237] 295 NLRB No. 112 (JD 10-11).

(C.A. 3, 1976), defined accretion:

> . . . an accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity. Thus, they are properly governed by the larger group's choice of bargaining representative.

The Court thereafter indicated the factors which should be considered when resolving accretion issues as:

> . . . integration of operations, centralization of managerial and administrative control and geographic proximity. Also, relevant are similarity of working conditions, skills and functions, common control over labor relations, collective bargaining history and interchangeability of employees [citations omitted].

In concluding that the unionized eastern division transportation drivers currently dispatched from Wilkes-

boro and that division's yardmen, have not lost their separate identities, I note that those employees, under Tyson, continued to constitute a numerical majority of the employees performing those functions at Wilkesboro, Monroe, Temperanceville, Harrisonburg and Glen Allen. Even though the terminals which, under Holly Farms, had corresponded to the aforesaid outlying plants, and at the Wilkesboro complex, were closed by Tyson after integration, those plants principally continued to be served on outhauls by drivers dispatched from the new Wilkesboro terminal. Mostly, these were the same drivers who previously had so served those facilities. These drivers, although currently assigned to longer runs, per-

formed basically the same functions as under Holly Farms, using the same tractors and work skills to deliver, at least on outhauls, essentially the same products. Also, as noted, Tyson had excepted its former Holly Farms eastern division drivers from its rule that drivers must live within a 50 mile radius of their terminals, and had permitted those drivers to reside away from Wilkesboro near the same outlying plants where they originally had been domiciled. Since the takeover, Tyson also has allowed four newly-hired drivers to live near Monroe and Glen Allen, although requiring that most other new hires be domiciled in the Wilkesboro vicinity.

The former Holly Farms transportation eastern division also retained a

separate structural identity within the Tyson organizational structure. David Hayes, who as Holly Farms vice-president for transportation, had had responsibility for that Company's eastern division transportation group, continued at Wilkesboro as eastern division manager, Tyson Transportation, to fill the role of senior resident transportation official. Hayes exercised responsibility for much the same work, personnel and area. Reporting to Hayes were two fleet managers, who filled the functions of the former dispatchers; a shuttle manager who, as noted, assigned local drivers, as had Holly Farms dispatchers; and a manager of outside transportation, which position was filled by a former Holly

Farms head dispatcher, replacing the Holly Farms outhaul manager. The shuttle manager, too, had been brought in from a lead dispatcher's post in Temperanceville, a position and location within the former Holly Farms transportation clerical employees, redesignated by Tyson as dispatch coordinators.

Shuttle drivers, classified by Holly Farms as local drivers, remained within Tyson Transportation, eastern division, and were dispatched from Wilkesboro by the shuttle manager. Where Holly Farms had employed 11 local drivers based at two locations, Tyson had 31 shuttle drivers distributed among four locations. Where Holly Farms had dispatched its local drivers on one-way distances of

100-150 miles, Tyson increased this distance to 250 miles.

Yardmen who, under Tyson, were moved from the transportation department to become plant employees at their former locations, also retained separate identity. They work under transportation coordinators, now also assigned to the plants who, as Holly Farms lead dispatchers, had supervised them before the takeover.[238]

Under Tyson, yard personnel no longer hook up or drop trailers to or from tractors, move tractors and trailers at specified places in the yard, or fuel tractors, which functions currently were performed by

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[238] As noted, the role of Tyson's transportation coordinators was much reduced from when they were Holly Farms dispatchers, but they continued to supervise the yardmen.

drivers. However, as described above, yardmen continued to perform all of their remaining traditional duties while continuing under the supervision of the redesignated former lead dispatchers. Although transferred to the plants, they were not absorbed into the production processes.

The foregoing factors demonstrate that the transfer of yardmen to the plant payrolls was indicative of administrative rather than of functional change.

A particularly significant manifestation of the separate identity of the eastern division transportation group was the arrangement carried forward pursuant to the Tyson/Holly Farms merger agreement of continuing

to provide Holly Farms employee benefits to Tyson's former Holly Farms employees for a period of 2 years after the effective date of the merger. As a result of this arrangement, these employees received the superior Holly Farms job benefits for 2 years while their fellow workers at Tyson did not. As described above, the separate record keeping this process entitled required that Tyson compensate these former Holly Farms employees using Holly Farms paychecks cut in Wilkesboro on the old Holly Farms IBM computer instead of with Tyson checks prepared on Tyson's Sperry Univac computer in Springdale.

These considerations, in the context of the Unions' manifested interest in continuing to represent the

former Holly Farms eastern division long haul and shuttle drivers and yardmen, warrant the conclusion here reached that the unit employees forming the former Holly Farms eastern division transportation group were not accreted to the Tyson transportation group, but have retained separate identity.

However, the western division drivers, after integration, were less separately identifiable than those in the east. The 25 western division drivers employed in early September at Seguin and Center, Texas, were moved to Tyson's new Carthage, Texas, terminal on about October 16, when that terminal opened and 10 more tractors and accompanying personnel were added to the Carthage comple-

ment. In addition to the Carthage facility's proximity to the Carthage, Seguin and Center plants, it also appeared to be the terminal closest to the one other Texas plant; to three plants in Arkansas; and to one plant in Oklahoma. Since outhaul assignments were made from Springdale on a basis of geographic proximity, drivers from the Carthage terminal would primarily serve all of those plants in addition to the plants in Seguin and Center.[239]

As noted, under Holly Farms, there had been administrative differences between the eastern and western transportation divisions. The

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[239] While the Seguin and Center terminals were closed when the drivers were moved to Carthage, the plants at those locations remained open.

eastern division had reported to Holly Farms president through David Hayes as vice-president for transportation, but the western division had so reported, not through Hayes, but through a division vice-president with production responsibilities. The Texas drivers were carried on the payroll of Holly Farms of Texas, Inc., a separate subsidiary from Holly Farms Foods, Incorporated, which paid the eastern division. Also, Holly Farms eastern division drivers were paid a lower maximum mileage rate than in the east.

After September, unlike the eastern division, western division employees did not continue to receive Holly Farms employee benefits and to be paid with Holly Farms pay checks,

cut on the old Holly Farms IBM computer. Instead, like other Tyson employees they were placed under the Tyson benefits program and were compensated by checks prepared on the Tyson Sperry Univac computer and distributed from Springdale.

Nevertheless, the 18 former Holly Farms drivers who were moved to Carthage from Seguin and Center, continued to constitute a clear majority of the relevant employees at that facility and continued to perform the same functions, exercising the same skills using the same equipment. While they, too, in servicing the additional plants in proximity to Carthage and in running extra "legs" to their trips, have spent more time on the road and away from home, they

have remained a recognizable majority group relocated to and concentrated within the new Carthage, Texas, terminal.

I, therefor, find that the drivers-yardmen unit, eastern and western divisions, did not become accreted into Tyson Transportation.

(c) The currently-appropriate drivers-yardmen unit

Having found that Tyson became Holly Farms' successor on July 18 and that the drivers-yardmen unit had retained separate identity and was not accreted into Tyson Transportation and, taking into account the extent to which the affected unit employees have been relocated and reassigned, I find the following redescribed unit to be appropriate:

> All driver employees employed by Tyson/Holly Farms who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Seguin and Center, Texas;[240] excluding all office clerical employees, guards and supervisors, as defined by the Act.

In accordance with the foregoing, I find that the Respondents, on and since August 8, violated Section 8 (a)(5) and (1) of the Act by refusing to bargain with the Unions concerning their decision to fully integrate the Holly Farms transportation depart-

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[240] The record does not describe what was done with the 10 western division yardmen after integration. This can be resolved in the compliance stage of this proceeding.

ment, western division, into the Tyson transportation system; that, from August 8 through September 12, these Respondents further violated those provisions of the Act by refusing to bargain concerning the unilateral decision to reduce the eastern division by laying off 71 employees and removing 47 tractors. The obligation to bargain concerning those announced reductions was not rendered moot by the Respondents' later unilateral September 12 recission of these reductions. The targeted eastern employees had been notified of their prospective layoffs and the recission was predicated upon and followed by the Respondents' unilateral merger of both divisions into Tyson Transportation. The initially-announced reduc-

tions in eastern division personnel and equipment were mandatory bargaining topics and the unilateral changes in wages, work locations and other terms of employment caused by the merger, in themselves violative of Section 8(a)(5) and (1) of the Act, in turn, led to the constructive discharges of 47 employees.

(d) The 47 constructive discharges

As found above, on September 12, following the negotiating session that day, Hayes, as Holly Farms vice-president for transportation, on Holly Farms stationery, sent copies of the above letter to all Holly Farms transportation drivers advising that all such drivers were being offered employment with Tyson under the Tyson pay plan, but that, as provided in

the merger agreement, Holly Farms benefits would continue to be provided for 2 years to Holly Farms drivers who accepted employment with Tyson. Interested employees were instructed to notify John Sloop by September 22.

The parties stipulated that, consistent with the testimony of long distance drivers Eastridge, Kanupp and Royal, the 47 above-named employees of the 209 drivers who had received Hayes' September 12 letter offering employment, rejected the terms set forth in that letter and did not come to work for Tyson. This was because they did not wish to accept the lesser pay and heavier work schedules then being offered by Tyson. The terms of the September 12 job offer

were explained to recipient drivers by the Respondents' officials during a series of above-described meetings held with these drivers during September, answering the Respondents' argument that the drivers, absent adequate explanation by the Union, had not been sufficiently familiar with the proffered changed conditions to have meaningfully protested.

In Manufacturing Services, Inc.,[341] the Board reiterated the test for constructive discharge:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employees' union activities.

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[341] 295 NLRB No. 31, sl. op. 4.

Applying this standard, the Board has found employees to have been constructively discharged in violation of the Act where, had they accepted the proffered employment, they would have been compelled to give up representation by their union;[242] where the employees would have had to endure a significant adverse change in work scheduling, in compensation[243] and in job benefits.[244]

Had Eastridge, Kanupp, Royal and the others among the 47 Holly Farms drivers accepted the September 12 job offer and remained under the avail-

[242] The Presbyterian Hospital in the City of New York, 285 NLRB 935, fn. 3, 941.

[243] Bronx Metal Polishing Co., Inc., 276 NLRB 299, 305.

[244] S. Freedman Electric, Inc., 256 NLRB 432, fn. 3, 440-441.

able job terms, they would have been burdened by all of the foregoing as resultant from the unilaterally-changed employment conditions. Any one of these changes, the Board has held, would have been sufficiently difficult or unpleasant to cause the constructive discharge of unaccepting employees. Instead of averaging 3-4 days away from home on each trip, while driving about 1,800-2,000 miles per week, as before, the drivers could expect to be away from home an average of 10-14 days/trip, while driving 2,700-3,000 miles/week. At the same time, eastern division drivers' mileage payments could be reduced by 2.75 cents/mile. They also would lose other above-described ancillary payments for drivers' ser-

vices since Tyson had a lesser schedule of fees in connection with stops and deliveries.

The announced preservation of Holly Farms' superior job benefits package was to be temporary—to be discontinued in 2 years. These benefits, which included paid drivers' motel rooms; 8 paid annual holidays at $55/day; paid jury duty and funeral leave; vacations; and medical insurance, were not matched by Tyson. Also, as the Respondents had unlawfully withdrawn recognition from the Unions, these employees would have been required to give up their right to representation by their bargaining agent of choice.

The Respondents' unlawful unilateral changes in working conditions

and their refusal to continue to recognize and bargain with the Unions as their employees' certified bargaining representative converted the above-named employees' refusals to continue to work into constructive discharges in violation of Section 8(a)(5) and (1) of the Act.[245] The Board further has held that "to condition employment upon the abandonment by employees of rights guaranteed them by the Act is equivalent to discharging them outright for union activity."[246] Accordingly, by constructive discharging the 47 above-named employees, the

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[245] Phillip Wall & Sons, Inc., d/b/a Phil Wall & Sons Distributing, 287 NLRB 1161, 1166.

[246] See Block-Southland Sportsmen, 170 NLRB 936, 138; Jo-Vin Dress Company, 279 NLRB 525, 532.

Respondents also violated Section 8(3) and (1) of the Act.

In so concluding, I am not persuaded by the Respondents' arguments that constructive discharge should not be found here since the terms offered to the former Holly Farms drivers were not so difficult or unpleasant as to have forced their resignations, as evidenced by the fact that the great majority of drivers who received the offer accepted; and that the job terms were not discriminatory since they were generally the same as applied to Tyson's other transportation division drivers. As discussed by Administrative Law Judge Maloney in his Board-approved deci-

sion in John Dory Boat Works, Inc.:[247]

> Where, as here, an event or requirement imposes on an employee an onerous or burdensome choice between remaining in employment or acceding to his employer's request and such event or requirement is generated by an employer's union animus, it does not matter how burdensome is the choice or how convenient are the alternatives. If the employee elects to leave under such circumstances, his termination is deemed a constructive discharge . . . . it is not the aggravated nature of choice imposed discriminatorily upon an employee that gives rise to a finding of constructive discharge, but the fact that any such choice was imposed at all for reasons proscribed by the Act.

Accordingly, in the context of the animus, found herein, the Respondents' unlawful conduct in making the

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[247] 229 NLRB 844, 850-851.

unilateral job offers to Holly Farms drivers was not legitimized by the fact that a majority of the unit drivers accepted the "offer." It is not possible to determine how many of the unit drivers who agreed to remain on Tyson's new terms would have done so had they an economic choice. From a standpoint of determining whether discrimination had occurred, under John Dory, supra, it is not relevant, in the context of the Respondent's motivating animus, that the former Holly Farms drivers were retained under the terms and conditions of employment that generally were similar to those of other Tyson drivers.

(e) Direct negotiations with unit employees

I find in further agreement with the General Counsel and Unions that

the Respondents did not meet their duty to bargain, in violation of Section 8(a)(5) and (1) of the Act, in bypassing the Unions and dealing directly with unit employees concerning terms and conditions of employment. This was done both by unilaterally preparing and sending copies of Hayes' above September 12 letter to former Holly Farms drivers offering them positions with Tyson under the lower Tyson pay plan and subject to other above-noted changes in employment conditions, and by the September activities of the Respondents' officials in thereafter meeting with groups of drivers to explain the new employment terms, to answer questions and, generally, to try to sell the new arrangement by direct

discussions with bargaining unit drivers. That this conduct occurred is undisputed.

As noted in Kenosha Auto Transport Corporation:[248]

> It is settled law that an employer runs afoul of the . . . statutory obligation where he bypasses a union which represents his employees and instead deals directly with the employees. See Dallas & Mavis Forwarding Co., 291 NLRB (980, 985) (1988) . . . The gravamen of the violation is that such conduct 'tend(s) to undermine the position of the union' and is subversive of the mode of collective bargaining *** ordained by the Act. See NLRB v. Goodyear Aerospace Corp., 497 F.2d 747, 752 (C.A. 6, 1974), and cases cited therein.

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[248] 302 NLRB No. 148 (JD 17).

(f) The withdrawal of recognition from the Unions

While the parties are in agreement that the Respondents, during the actual September 12 negotiating session, did not withdraw recognition from the Unions as bargaining representative for the drivers-yardmen unit in so many words, it is clear that, in view of the Respondents' announced unilateral changes that day, including plans to merge the Holly Farms bargaining unit completely into the Tyson transportation system, with associated other other unilaterally-imposed changes concerning work locations, rates of pay, work hours and scheduling, future job benefits, and other employment terms, the bargaining to be permitted the Unions would be limited both as to

scope and duration. In this regard, the Respondents, at that meeting, refused to furnish the requested Tyson/Holly Farms merger agreement which, the Unions were informed, contained those Companies' agreement concerning the future of unit employees' job benefits; advised the Unions that Holly Farms, not Tyson, was prepared to continue bargaining, but only as to the impact of the announced unilateral changes upon the employees; and that contract negotiations could continue only until such time as the Respondents considered the old Holly Farms unit to have been completely merged into the Tyson transportation system. After that, the Unions would have lost their majority status and the unit would have

ceased to exist. In subsequent correspondence, described above, the Unions were advised that integration was completed and recognition was withdrawn.

All this occurred during the Unions' certification year.

Administrative Law Judge Evans, in his Board-approved decision in Star Dental Products, A Division of Den-Tal-Ez, Inc.,[249] citing Kimberly-Clark,[250] noted that, to promote industrial peace, "the Board has consistently interpreted the statutory framework to require that its certification of collective bargaining representatives be essentially uncon-

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[249] 303 NLRB No. 148 (JD 4).

[250] 61 NLRB 90.

testable for a period of 12 months."

Judge Evans continued as follows:

> In Brooks v. NLRB, 348 U.S. 96 (1954), the Supreme Court approved the Kimberly-Clark rule stating that a certification based on an election must be honored for a 'reasonable period, ordinarily one year,' in the absence of 'unusual circumstances' such as (1) a schism within the certified union, (2) the defunctness of the union, or (3) radical fluctuation in the size of the bargaining unit within a short period of time. Absent such circumstances, 'self-help,' in the form of a refusal to bargain based on doubts of a union's continuing majority status, is available only after the expiration of the certification year.

The only "unusual circumstance" argued by the Respondents here to justify their withdrawal of recognition from the Unions was the increased size of the drivers' group

after they had merged the drivers unit employees into the larger Tyson transportation system. However, it had been found above that instead of retaining Holly Farms' unit employees under initially different employment terms as it then was privileged to do under Burns, supra, by the time Tyson made the relevant changes, 2 months after the takeover, the existing employment terms had become established and were not subject to unilateral change, either as to the initial decision or as to the effects of such a decision. Therefor, the unilateral changes in pay, work locations, schedules and other terms of employment resulting from the merger,[251]

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[251] Jo-Vin Dress Company, Inc., 279 NLRB 525, 532.

and the merger process, itself, which had increased the size of the unit, were unlawful refusals to bargain.

In so concluding, I note that Tyson took over Holly Farms with full knowledge of Holly Farms' bargaining obligations. The status of bargaining was intensively discussed by Tyson and Holy Farms management during July 14-15 meetings, and such knowledge was carried forward when Tyson brought almost all Holly Farms managers into its own organization. Nor was integration of the two trucking systems a new idea warranting delay. On January 24, about 6 months before Tyson assumed control and while its purchase bid was pending, Tyson vice-president Irwin, at the request of Don Tyson, that Company's

chief executive officer, had drawn up an initial outline for precisely such a merger.

Accordingly, I conclude that the Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Unions as bargaining representative of the drivers-yardmen unit,[252] particularly since such withdrawal occurred during their certification year.[253]

By unilaterally changing the wages and other terms and conditions of its former Holly Farms drivers and yardmen without giving the Unions an opportunity to negotiate concerning the relevant decisions, Tyson further

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[252] Phillip Wall & Sons, Inc., d/b/a Phil Wall & Sons Distributing, 287 NLRB 1161, 1165-1166.

[253] Star-Dental Products, et al; supra.

violated Section 8(a)(5) and (1) of the Act.[254]

(g) The unilateral changes in job benefits, including retirement

As noted, the Unions were notified during the September 12 negotiating sessions and thereafter that, in accordance with the terms of the Tyson /Holly Farms merger agreement, the superior above-described Holly Farms job benefits package, including the pension plan, would be continued intact by Tyson for its former Holly Farms eastern division employees for 2 years after Tyson's assumption of control.

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[254] Jo-Vin Dress Company, Inc., 279 NLRB 525, 532.

Live haul driver Dimmette[255] testified without contradiction that from the Respondent's December 1989 correspondence and at a January 1980 meeting conducted by personnel manager Mathis, he and other employees were informed by Tyson's management that, in September 1991, about 2 years after the effective date of Tyson's takeover, the Holly Farms pension plan would be terminated and the employees paid off. Although the changes affecting fringe benefits, including pension, for Tyson's former Holly Farms eastern employees were deferred for 2 years, those changes, including the 2 year continuation period, had not been negotiated with

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[255] While Dimmette was a live haul unit, rather than transportation unit employee, his testimony was germane to both groups.

the Unions. This deferred, but unilaterally-imposed change in the duration of the retirement plan and other jobs benefits was violative of Section 8(a)(5) and (1) of the Act.

(h) <u>The refusal to furnish the requested merger agreement</u>

The General Counsel and Unions contend that the Respondents further failed to bargain by refusing the Unions' request that they be provided with a copy of the merger agreement between the two Companies. This request, originally made during the September 12 negotiating session, came after the Respondents had informed the Unions that, in accordance with that merger agreement, fringe benefits for former Holly Farms eastern employees in Tyson's employ would be continued by Tyson for 2 years

after the effective date of the merger agreement.

This arrangement was highlighted in David Hayes' September 12 letter to Holly Farms drivers offering them jobs with Tyson. Hayes' letter specifically informed the drivers that "Fringe benefits currently in effect will be continued for Holly Farms drivers who accept employment with Tyson, as prescribed by the merger agreement."

While the Unions' initial September 12 request was made orally, they repeated their demand for the merger agreement several times thereafter in written correspondence to the Respondents and, in one such letter, offered to enter into a confidentiality agreement concerning that document to

meet any of Tyson's concerns in that regard. It, of course, is the Unions' contention that such information was necessary for the fulfillment of its bargaining responsibilities.

The Respondents answered by repeatedly advising the Unions that they were not entitled to the document. The Respondents' attorney, Hogg, in correspondence, notified the Unions that he had attended negotiating sessions since the Tyson stock purchase only as counsel to Holly Farms and that, since Tyson had no bargaining relationship with the Unions, that Company had no duty to furnish the requested merger agreement. He later advised that Holly Farms, too, had no such obligation as

that company's separate existence had ceased following its completed integration into Tyson during the fall of 1989. Hogg, however, without conceding the responsibility of either Company to provide the merger agreement, included in his October 10 correspondence to the Unions a represented verbatim copy of the relevant merger agreement provision. Accordingly, the Respondents, while continuing to deny any duty to furnish the merger agreement, itself, contend that the issue is now moot as the relevant language of the merger agreement had been given to the Unions.

The General Counsel and Unions, asserting the Unions' entitlement to receive the entire merger agreement, reject the adequacy and timeliness of

the provision set forth in Hogg's October 10 letter.

Administrative Law Judge Zankel, in his Board-approved decision in New England Newspapers, Inc., d/b/a Transcript Newspapers,[256]

> . . . . An employer's duty to bargain in good faith includes the obligation to provide information needed by a bargaining agent for the proper performance of its duties. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). The right to receive information arises by operation of the Act itself, on an appropriate request and the scope of the right is limited only by considerations of relevancy. Ellsworth Sheet Metal, 224 NLRB 1505, 1507 (1976). In Bohemia, Inc., 272 NLRB 1128, 1129 (1984), the Board observed:
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> > [A]n employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." Associated General Contractors of California, 242 NLRB 891, 893 (1979), enfd. 633 F.2d 766 (9th Cir. 1980); NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). The Board uses a liberal, discovery-type standard to determine whether information is relevant, or potentially relevant, to require its production. NLRB v. Truitt Mfg. Co., supra. Information about terms and conditions of employment of employees actually represented by a union is presumptively relevant and necessary and is required to be produced. Ohio Power Co., 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).
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> Requested information that is not so apparently related to a union's bargaining obligations is not presumptively relevant. In such situations, there must be a demonstration of relevance. NLRB v. Rockwell Standard Corp.,

[256] 286 NLRB 124, 128, enfd. 856 F.2d 409 (C.A. 1, 1988).

410 F.2d 953, 957 (6th Cir. 1969). Information not presumptively relevant nonetheless may have an "even more fundamental relevance that than considered presumptively relevant." Prudential Insurance Co. of America v. NLRB, 412 F.2d 77, 84 (2d Cir. 1969). Not all relevant information need be disclosed. If the information is of a confidential nature, it may be withheld until appropriate safeguards are provided. Detroit Edison Co. v. NLRB, 440 U.S. 301, 314 (1979).

In agreement with the General Counsel and Unions, and in accordance with the above authority, I find that the merger agreement is the most authoritative and reliable source concerning what Tyson and Holly Farms had agreed regarding continuation of Holly Farms job benefits for former Holly Farms employees in Tyson's employ and that the single provision from that agreement later quoted to the Unions was inadequate. The pro-

vision, as set forth in Hogg's October 10 letter, is difficult to decipher apart from the overall agreement. In this regard, language in the quoted provision that "following the Effective Time, the Surviving Corporation will provide for a period of two years after the Effective Time employees of the Company (excluding for purposes of this Section 5.8 employees covered by collective bargaining agreements or who are members of a collective bargaining unit or labor union) with employee benefits . . . . which are no less favorable in the aggregate than the employees benefits provided . . . . for such employees by the Company as the date hereof," raises other questions. These include (1) whether the paren-

thesized phrase, on its face, precludes employees from receiving the continued employee benefits if those employees were members of a collective-bargaining unit or a labor union and (2) what was the actual date of the merger agreement. With respect to the first question, it would appear from the language used that, contrary to the testimony and representations, including those made to Holly Farms drivers in the September 12 written job offers, that Section 5.8 of the merger agreement did not apply to employees who belonged to a bargaining unit or union, which, at least, raises the possibility that such employees, to receive the benefits, might have been qualified under some other provision in that docu-

ment. It, of course, also would be necessary to obtain the date of the merger agreement to determine the precise date for the expiration of those benefits.

Also, as in Transcript Newspapers, supra,[257] the merger agreement "struck at the core of the employment relationship of the unit employees represented" by the Unions because it may well have been "the base instrument" defining the relationship between Tyson and Holly Farms and containing other agreements affecting employees. Arguably, all of the Unions' problems in representing this unit since August can be traced to the merger agreement. As in Transcript Newspapers, noting that the

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[257] Id. at 128.

merger agreement could have established each Company's role in the continued operation of the business; future operating plans and the status of fringe benefits for unit employees, who expressly were excluded from the coverage of the provided paragraph, I find that the entire merger agreement was necessary to enable the Unions to formulate intelligent and comprehensive bargaining proposals in fulfillment of their responsibilities as representative.[258]

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[258] In concluding that the Unions are entitled to receive the complete merger agreement, I do not presume that the parties would be unsuccessful in reaching a mutually satisfactory agreement regarding the Unions' offer of confidentiality to be afforded that document. However, since the Respondents' refusals to supply that document were based upon their position that the Unions simply were not entitled, rather than upon confidentiality, any future inability of the parties to arrive at a confidentiality agreement should not relieve the Respondents of their duty to furnish the merger agreement.

Accordingly, I find that the Respondents' refusal to comply with the Unions' requests for a copy of the entire merger agreement between them was in violation of Section 8(a)(5) and (1) of the Act.

3. Tyson's duty to remedy Holly Farms' unfair labor practices

I find that Tyson, as successor, has the responsibility of remedying Holly Farms' unfair labor practices occurring prior to July 18, found above, because management representatives Blake D. Lovette, Everett (Skipper) Solomon, A. Gerald Lankford, David Hayes, Barbara Mathis, David Fairchild, Sam Whittington, Ray Lovette, Larry Church, Al Bare, John Sloop, Bob Absher, and others, moved from Holly Farms to Tyson with full

knowledge of Holly Farms' unfair labor practices.[259]

4. The alleged unfair labor practice strike—facts and conclusions

The General Counsel and Unions contend that a strike that began on October 1 among former Holly Farms drivers, represented by the Unions, was an unfair labor practice strike caused and prolonged by the unlawful and unremedied conduct of Holly Farms before July 18 and of Tyson since that date.

The Respondents argue that the evidence concerning the reasons for the strike was too confused and/or inadequate to show that the strike was caused or prolonged by unfair

[259] Memphis Truck and Trailer, Inc., et al., 248 NLRB 900.

labor practices and emphasize that the strike, in any event, could not have been an unfair labor strike because it was not called in accordance with the Unions' bylaws. In this regard, the Respondents assert that the evidence does not show that a sufficiently large number of bargaining unit employees participated in the strike vote to have enabled the strike to be authorized in accordance with the bylaws. Although the seven Teamsters local unions were certified to jointly represent the drivers-yardmen unit, the record contains evidence of a strike vote taken only by Local 391.

Local Union No. 391 business agent Reuben W. Brown[260] described the events leading to the strike.

Brown related that, on August 12, pursuant to notices issued to the drivers and yardmen 4 days earlier by Bruce Blevins, Local 391 secretary-treasurer, a strike vote meeting of those employees who, in Wilkesboro, were represented by Local 391 was held at a local motel. This was attended by 66 unit employees.

Secretary-treasurer Blevins opened the August 12 meeting by reviewing and explaining to the membership the Respondents' negotiating proposals that had been given to him as union

[260] Brown, an officer of Local 391 since 1968, was in charge from inception of the Unions' organizing campaigns for the different units at Holly Farms.

spokesman during the then-recent negotiating sessions of August 8, 9 and 10.[261] At Blevins' request, Brown then read aloud every allegation of the latest consolidated complaint in this matter, which he had distributed to the employees as they came in. When he finished reading the complaint, Brown told those present that, in his opinion, the violations alleged were substantial and, in effect, that because of the nature and severity of the violations, a strike in response would be an unfair labor practice strike. Brown referred to a Section 10(j) injunction

[261] As noted, during those negotiating sessions, the Unions were notified of the Respondents' plans to unilaterally merge Holly Farms' western transportation division into its own larger system and to lay off 71 drivers and eliminate 47 tractors from the eastern division.

that Counsel for the General Counsel then was seeking.[262]

Blevins then resumed the floor, telling the others present that before a strike vote could be taken, at least 50 percent of the eligible voters in that area would have to be available. He reiterated Brown's point that the complaint allegations were so severe that the Union would have to call an unfair labor practice strike, but told the group that the Union, at that time, only was seeking authorization from the employees to call a strike when the Union considered appropriate. Blevins overruled

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[262] The subject matter before the U.S. District Court, Nashville, Tennessee, in the Section 10(j) injunction proceeding related the above-considered discharges of Bouchelle, Barker, Huffman and Richardson, and included Richardson's disputed status as a supervisor. That matter was resolved by a Court order issued October 26.

a motion for a stand-up vote, declaring that the vote would have to be taken by secret ballot. The ballots then were distributed, marked and counted. The tally showed that 63 employees voted to authorize a strike, none opposed, with 3 abstentions.

Although the Teamsters International Union bylaws provided that, while a simple majority of 50 percent plus 1 vote would suffice to authorize rejection of a proposed contract, a two-thirds majority vote would be necessary in order to both reject a proposed contract and authorize a strike. Since Brown had information only about the 66 employees who participated in the Local 391-sponsored vote on August 12, he could not tes-

tify as to whether the employees represented by the 6 other Teamsters locals which, jointly with Local 391, represented the overall unit, also had voted to authorize strike action.[263] Therefor, the record contains no evidence that two-thirds of the employees in the relevant unit had voted to support a strike to be authorized in conformity with the International Union's bylaws.

Brown also described certain relevant later meetings called by Local 391, which also led to the strike. One such meeting of Local 391 officials and mostly Wilkesboro-based

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[263] As noted, the six other Teamsters locals certified jointly with Local 391, based in Kernersville, North Carolina, were: Local 29 in Harrisonburg, Virginia; Local 71, Monroe, North Carolina; Local 355, Baltimore Maryland; Local 592, Richmond, Virginia; Local 657, Seguin, Texas; and Local 988, Center (Houston), Texas.

employees took place on September 16, following the controversial September 12 negotiating session. Present were Local 391 president R. V. Durham; secretary-treasurer Blevins; the Unions' attorney, J. David James; Doug Norris, a business representative; and Murl Kelly, chairman of the Unions' negotiating committee. Also present were about 60 drivers and yardmen from Wilkesboro and 2 unit employees from Monroe. Durham and Blevins described what generally had taken place during negotiations, with Durham focusing on what had occurred during the September 12 session. Before Brown, who described the session, was obliged to temporarily leave the meeting, he heard Durham introduce attorney James who began to

speak of the legal ramifications. When Brown returned, the meeting was over. The only decision then taken was that, as James recommended, the employees should show up to work for Tyson.

At the September 25 meeting of Blevins, Brown and Kelly, it was agreed that Brown should get some of the employees together to find out if the employees still were as willing to strike as when the August 12 vote was taken. Brown complied, checking with a number of employees.

On the morning of September 30, Brown met with seven of the Respondents' employees and several union officials expected to be present when the picket line was set up. Brown told the group that he had a permit

approved by the chief of police that the strike go forward on October 1 at 12:01 a.m. The strike commenced on schedule.[264]

I find no merit to the Respondents' argument that the strike that began on October 1 was not an unfair labor strike because not authorized by a two-thirds vote, as required by the International Union's bylaws. The principle that a Union in a bargaining relationship is the only party to determine whether its relevant internal rules have been fulfilled was expressed in North Country Motors, Ltd.[265] In North County Motors, supra, the Respondent Employer,

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[264] No unconditional offer to return to work and end the strike was made before the conclusion of the hearing.

[265] 146 NLRB 671, 674.

in defending against the Union's contention that it had failed to bargain by refusing to sign a fully-negotiated, duly-ratified collective-bargaining agreement, argued that, contrary to the Union's bylaws, the Union had failed to obtain appropriate ratification. The Union, in fact, had had difficulty in obtaining ratification. After the employees twice had voted to reject an earlier tentative contract, the parties conducted further negotiations and reached a revised agreement which the Union business agent optimistically had predicted to the Employer would be ratified. However, only one member of the nine employees unit attended either of the two meetings the business agent thereafter had called

to obtain ratification. Finally, only that employee voted, and his ratification of the agreement was cited to the Respondent, over its objection, as fulfillment of that prerequisite.[266] In finding that the Respondent had violated the Act by refusing to sign the negotiated contract, the Board held:

> . . . we cannot agree . . . . that the one vote ratification was in conflict with the policies of the Act. The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf. In a case such as this, the requirement for ratification could only have been one which the Union itself assumed. It was thus for the Union,

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[266] In North Country Motors, supra, the Union's bylaws provided for ratification by "a majority vote of those present and voting at the meeting." The International Union's constitution contained a similar provision.

> not for the Respondent, to construe the meaning of the Union's internal regulations relating to ratification. Whether the one-vote ratification in the circumstances here present was enough to satisfy the Union's bylaw requirement for 'approval by a majority vote of those present and voting at the meeting' was a matter for the Union to decide, and not for the Respondent to challenge once assured by the Union that the latter's ratification requirements had been met.

Here, the right of the Respondents, jointly and separately responsible for many unfair labor practices, to properly determine whether the Unions had sufficiently complied with their bylaw provisions so as to conduct a valid strike in protest of the Respondents' own unlawful conduct, would appear to be even more remote than in North Country Motors.

As in that case, the Unions' internal rules for authorizing strikes are their own affair, are not binding on the Board in determining whether, in fact, an unfair labor practice strike has occurred, and such internal rules certainly were not intended to provide refuge for the party whose unlawful conduct had precipitated the strike in the first place.

As the record shows that the strike occurred pursuant to a duly-noticed strike vote at a meeting called for that purpose; that the vote to authorize strike action was taken against the background and in protest of the Respondents' unlawful conduct; and that the great majority of those in attendance voted in favor, I find that the strike that be-

gan on October 1, in which about 40 drivers joined,[267] was an unfair labor practice strike, caused and prolonged by the Respondents' unfair labor practices.

5. Refusals to bargain concerning the live haul unit

(a) The size and composition of the unit

As noted, in accordance with the Board's Decision on Review and Order, dated July 20, 1989, in Case 11-RC-5583 partially reversing his June 20 Supplemental Decision and Direction

[267] Since several of the 47 above-named drivers, found above to have been constructively discharged on September 22, testified that they joined the strike when it began on October 1, their testimony may have increased the perceived number of strikers. Actually, the dischargees, who had been terminated before the start of the strike, retained their status as unlawfully terminated dischargees and did not later become strikers since, by October 1, they already had been removed from the payroll. Determination of the strikers' identities, if relevant, should be left to the compliance stage of this proceeding.

of Election in that matter, the Regional Director found the following unit appropriate for purposes of collective bargaining:

> All live haul (chicken catching crews) employees employed at the processing facility of Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of Respondents at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

The Respondents maintain, as they have during the course of Case 11-RC-5583, that the live haul employees cannot appropriately be included in a Board-found bargaining unit because they are agricultural workers, exempt under Section 2(3) of the Act. In the alternative, the Respondents ar-

gue that, if the live haul workers are not held to be agricultural, then the above-described unit still would be inappropriate because their approximately 2,000 Wilkesboro production workers were not also included.

I, of course, am bound by the Board's prior determination that the unit as described is appropriate.[268]

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[268] In accordance with the Respondents' position that the live haul employees should be excluded from the unit because they were exempt agricultural workers, and with the requirements of the subsequent decision in Camsco Produce Company, Inc., 297 NLRB No. 157, sl. op. 11, where the Board determined that it would "assert jurisdiction if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question," the parties entered into the following stipulation concerning the Respondents' live haul operations:

The live-haul department, meaning catchers and drivers, catch Company-owned chickens at the grow-out farms and deliver those chickens to the processing department at the Wilkesboro processing plant. The grow-out farms have contracts with Holly Farms to grow the Holly-owned chickens. All chickens caught and transported by live haul from the farms to the plant are owned by Holly Farms. On

(continued...)

(b) Majority status

In accordance with the parties' stipulation, I find that on March 31,

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[268](...continued)
occasion, Holly Farms buys live chickens from other producers of chickens not associated with Holly Farms that are caught and transported by Holly Farms live-haul from the outside source to the processing plant. The last time this occurred was October 1989 when Holly Farms bought approximately 60,000 chickens. During 1989, Holly Farms live haul caught and transported a total of approximately 575,000 chickens from these outside sources spread over seven separate occasions. These were processed by the Wilkesboro processing plant. This outside purchasing was done when the processing plant ran short of chickens and when another producer had extra chickens. However, normally, when Holly Farms was short of chickens, so was the rest of the industry.

Holly Farms also buys approximately 2,000 grown chickens a month from Pilch, which are hauled by Pilch to the processing plant in Wilkesboro. Live haul does not catch or haul these chickens with the exception that on January 23, 1990, one live haul truck with a forklift picked up chickens from Pilch and hauled them to the processing plant. No catchers were involved. This will not occur again because it cost Holly Farms more to pick up those chickens than can be earned on them.

During 1989, Holly Farms killed and processed approximately 96 million chickens at its Wilkesboro processing plant, which includes the approximately 575,000 purchased from outside sources that were transported by Holly Farms live haul.

the date when the complaints, as amended, allege that Local 391 had achieved majority status in the live haul unit, that Union had 103 signed and dated authorization cards received from among the 201 employees then in the unit. Noting that the stipulation also affirms the authenticity of the signatures and dates on those cards, I conclude that on the critical date of March 31, a majority of employees in the bargaining unit had freely authorized Local 391 to represent them by signing unequivocal authorization cards.[269]

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[269] The authorization cards obtained by the Union included blank lines for theemployee's name, home address, telephone number, employer, employment date, city and state of employment, date of birth, social security number and date of application. The authorization card's heading and text, shown below, were followed by an employee signature line:

(continued...)

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[269](...continued)

APPLICATION FOR MEMBERSHIP IN LOCAL UNION NO. 391 Affiliated with the International Brotherhood of Teamsters Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO

* * *

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. I authorize my employer to deduct from my wages and to pay to any authorized representative of Local Union 391 all sums as shall be certified by Local Union 391 to be paid in consideration of the representation provided to me by Local Union 391.

This authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination of the agreement between the Employer and Local Union 391, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and the Union written notice of revocation bearing my

(continued...)

(c) The applicability of a bargaining order

Having found that on March 31, Local 391 represented a majority of the Respondents' live haul employees because of the employees' execution of authorization cards which, on their face, duly designated that Union as their exclusive representative for purposes of collective bargaining with the Respondents, it has been concluded that the Union was validly selected by a majority of the Respondents' employees as their exclusive bargaining representative in a bargaining unit found appropriate

[269](...continued)
signature thereto. This authorization shall go into effect immediately or upon ratification of a collective bargaining agreement if one is not presently in effect: Union Dues not deductible as charitable contributions for Federal Income Tax purposes.

by the Board. The Union's subsequent loss of its majority status is not controlling for it must be presumed that, but for the Respondents' unfair labor practices, that majority status would have been retained.

In considering whether a bargaining order was warranted to remedy an employer's unfair labor practices, the Board, in Koons Ford of Annapolis,[270] restated the applicable rule of NLRB v. Gissel Packing Co.:[271]

> In Gissel, the Court delineated two types of situations where bargaining orders are appropriate: (1) 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices; and (2) 'less extraordinary' cases marked

[270] 282 NLRB 506, 507, enfd. 833 F.2d 310 (C.A. 4, 1987), cert. denied ___ U.S. ___, 128 LRRM 2144 (1988).

[271] 395 U.S. 575 (1969).

by 'less pervasive' practices.'5 Thus, the court placed its approval on the Board's use of a bargaining order in 'less extraordinary' cases where the employer's unlawful conduct has a 'tendency to undermine [the union's] majority strength and impede the election processes.6 The Court indicated that when the unfair labor practices are less flagrant and the union at one time had a majority support among the unit employees the Board may consider

> the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.7

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5 Gissel, supra at 613-614.
6 Id. at 614.
7 Id. at 614-615.

In finding that a bargaining order is justified in the present matter, I conclude that the Respondents' unfair labor practices would come within the second Gissel category, described above.

Affecting the live haul unit, the record discloses numerous instances during which the Respondents' officials in the Wilkesboro complex, including A. Gerald Lankford, Holly Farms' vice-president for human resources; Sam Whittington, the live production manager; Ray Lovette, the live haul manager; David Minton, a live haul superintendent; Barbara

Mathis, the personnel manager; and Dean Grimes, a live haul dispatcher/ supervisor, variously threatened to cause the arrest of any employees caught distributing union literature in non-work areas on Company property during non-work time; maintained and enforced an unlawfully broad no access/no distribution rule prohibiting union activities in non-work areas of Company property during non-work time; granted an unlawful pay raise 4 weeks before the representation election; threatened an employee-union activist with discharge; gave the same employee a written warning and threatened yet another employee that this activist employee would be terminated; repeatedly interrogated employees concerning their union sen-

timents; repeatedly solicited, promised to remedy, and actually remedied, employees' grievances by expanding the workweek; impressed employees with the futility of supporting the Union; informed employees that if the Union were selected as bargaining representative, the Company would know how they had voted; inhibited and threatened unspecified retaliation for wearing union insignia; discriminatorily removed and excluded union materials from Company live haul department bulletin boards; and, after the election, announced that the Respondents unilaterally would end the Holly Farms pension plan for live haul and transportation department unit employees at a specified later date.

As in J. J. Newberry Co., a wholly-owned Subsidiary of McCrory Corporation,[272] the Respondents' grant of substantial economic benefits in violation of Section 8(a)(1) of the Act, such as the wage increase and the expanded workweek,[273] are hallmark violations "sufficient to render it unlikely that a fair election could be held. Thus the Board has long recognized that employees are not likely to miss the inference that 'the source of all benefits now conferred is also the source from which

[272] 249 NLRB 991, 993, enfd. in rel. part denied 645 F.2d 148 (C.A. 2, 1981). Also see Pembrook Management, Inc., 296 NLRB No. 143, sl. op. 8, citing Honolulu Sporting Goods Co., 239 NLRB 1277, 1282, and Tower Records, 182 NLRB 382, 387.

[273] As noted, in May, the workweek had been increased from 4 to 5 days in the effort to remedy grievances Ray Lovette had unlawfully solicited from live haul drivers.

future benefits must flow and which may dry up if not obliged.' N.L.R.B. v. Exchange Parts Company, 375 U.S. 405 (1964) [other citations omitted]." Here, the Respondents' granting of unlawful economic benefits were only two of numerous unfair labor practices directed at live haul unit employees and intended to undermine the Union's majority status. Accordingly, even without regard to the Respondents' unlawful conduct affecting its employees outside of the live haul unit, I find that a bargaining order is necessary and justified to protect the majority sentiment expressed through authorization cards and to remedy the violations committed.

However, concurrently with its anti-union campaign among the live haul unit employees and also affecting them, the Respondents committed serious violations of the Act against neighboring employees based in the same Wilkesboro complex who belonged to the drivers-yardmen unit and others who were plant workers. Respondents' officials responsible for such violations occurring before the July 27 live haul election included Blake D. Lovette, Holly Farms' president and chief operating officer; David Hayes, vice-president for transportation; A. Gerald Lankford, vice-president for human services; Larry Church, chief of security; Bob Absher, head dispatcher; John Sloop, driver-coordinator; and Murl Murphy,

supervisor/dispatcher.[274] These individuals, between them, repeatedly threatened unit drivers that, whether or not they chose the Unions to represent them, Holly Farms trucking operations would be discontinued, the trucks sold, the hauling service contracted out and their jobs lost; maintained and discriminatorily enforced unlawfully broad no access/no distribution rules; threatened to arrest six off-duty employees for engaging in union handbilling in non-work areas on their own non-work time; caused the arrest and issued written warnings to three employees

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[274] As noted, all of the aforesaid Holly Farms officials accepted generally comparable positions with Tyson, except that Sloop was promoted to an even more responsible position as Tyson's manager, personnel and safety, Wilkesboro.

for engaging in such activities; threatened employees with unspecified reprisals for having supported the Unions; discriminatorily discharged four plant employees for having engaged in union activities; and prohibited a plant employee from discussing his pay rate with fellow employees.

The Respondent's conspicuous unlawful conduct affecting neighboring employees in the drivers-yardmen unit continued after the live haul election and the Tyson takeover. Such activities included the Respondents' unilateral merging of the eastern and western divisions of the existing drivers-yardmen unit into the Tyson transportation system; the Respondents' unilaterally-imposed reloca-

tions and changes in the wages, hours and other terms and conditions of employment affecting employees in that unit; the withdrawal of recognition from the Unions during their certification year as bargaining representative; the bypassing of the Unions and direct bargaining with those employees; and the constructive discharges of 47 drivers who declined to accept the Respondents' unlawful unilaterally-imposed employment terms. Such post-election conduct tactically positioned the Respondents to gain an advantage in the event of a new election, reducing the efficacy of such an election.

The Respondents, however, argue that in determining the applicability of a bargaining order for the live

haul unit, only unlawful conduct directed at employee members of that unit should be considered and that, therefor, their actions affecting employees within the drivers-yardmen unit or those who worked in the plant is not germane. While, admittedly, most Gissel bargaining orders are issued on the basis of unlawful conduct directly affecting employees of the subject unit, this is not necessarily the case.

In J. P. Stevens, Inc.,[275] in the context of repeated, aggravated violations found in the series of cases involving that Company, the Board held that it was appropriate to extend the bargaining order issued in

[275] 239 NLRB 738, 770-771, enfd. in rel. part 623 F.2d 322 (C.A. 4, 1980).

that matter to all J. P. Stevens facilities where the Union's representative status already had been established. This provided a remedy of corporate-wide scope unlimited by proof that employees in other of that Company's facilities, who might be affected by the bargaining order, actually knew of or were affected by the specific unfair labor practices that had led to the issuance of the bargaining order in the adjudicated matter. In providing this broader remedy in J. P. Stevens, supra, it was noted that:

> . . . the plants were contiguous; that since the policies which gave rise to the unfair labor practices were centrally developed, there 'was every reason to believe that if not deterred, [the Company] would pursue the same discriminatory policies throughout

> the region;' and that 'the Company's practices were so extensive and so well publicized that they must inevitably have had a coercive impact at the remaining plants.' [citations omitted]

While the Respondents' conduct in the present matter, of course, differs from that described in the J. P. Stevens series, the Respondents here, nonetheless, have engaged in numerous unfair labor practices of the most serious nature, pervading the Wilkesboro complex and beyond. Although enacted in a smaller, more localized setting that were the J. P. Stevens cases,[276] the Respondents' conduct, principally affecting employees in

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[276] J. P. Stevens, Inc., had more than 40 plants scattered throughout several states.

the Wilkesboro complex, was intensely concentrated.

As in J. P. Stevens, supra, at the Wilkesboro complex, the live haul facilities were contiguous with the plants and, before the autumn merger of trucking operations, live haul also was contiguous with the nucleus of the eastern division transportation department. Labor relations policies always were centrally controlled. Before tyson, Holly Farms' labor policies were governed from Wilkesboro by Blake Lovette and Lankford, assisted by personnel manager Mathis. After the takeover, such policies became centrally controlled from Springdale, with local substantial input from Lovette and Lankford, who continued to function for Tyson

in much the same way. The Respondents' unilateral merger of the former Holly Farms transportation division into the larger Tyson transportation system; the relocation of the Wilkesboro terminal and persons employed there; the attendant changes in the affected employees' wages and working conditions; the constructive discharge of 47 drivers resulting from those unilateral changes and the Respondents' abrupt withdrawal of recognition from the Unions during their certification year, were overt, conspicuous and highly publicized actions by, perhaps, the area's largest employer.

The Respondents did not try to conceal from live haul employees their unlawful conduct affecting em-

ployees in other units. When, as found above, Lankford, in the first week of April, told at least one meeting of live haul employees that there would be no union handbilling on Company property, that three employees had been arrested for engaging in such activities and that he did not need any more arrests, he, of course, was referring to the arrests of Branscome, Hester and T. R. Hayes of the drivers-yardmen unit. When that incident occurred, the unions already had been certified as representative of the drivers-yardmen unit and the three drivers were assisting Local 391 in organizing other groups of employees. Accordingly, when Lankford, to discourage support for the Union, attempted to gain addi-

tional impact from the arrests of the three drivers by mentioning the incident to live haul employees, he not only crossed unit lines, himself, to describe to live haul employees what Holly Farms had done to its other employees for handbilling and, likewise, was prepared to do to them should they engage in such conduct, but also informed the live haul workers of the existence of the unlawfully broad no access/no distribution rule that was being enforced on Company property. As found above, in that same time frame, plant employee Dowd also was told of these arrests by a security guard as she walked through a Company parking lot holding union authorization cards in her hand. The guard, as found above, was

acting as a Company agent when he spoke to Dowd.

It, therefor, is not reasonable to assume, as urged by the Respondents, that the live haul employees, at the time, were ignorant of the Respondents' unlawful conduct occurring on parking lots and in the complex around them, and which, in instances, was called to their attention by members of management for the Respondent's own purposes.[277]

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[277] J. P. Stevens, Inc., 247 NLRB 400, 492, cited by the Respondents, is inapplicable. That case merely denied the General Counsel's request for a prospective bargaining order that would cover future bargaining requests anywhere in that Company's extensive enterprise should the Union secure a card majority or certification at any Stevens' facility. Even though J. P. Stevens had shown a pronounced disposition to violate the Act, the Board simply held that each requested Gissel bargaining order must be assessed on its own merits. This J. P. Stevens case differed from the earlier J. P. Stevens case, cited by me where the bargaining order was not prospective since extended only to other

(continued...)

Contrary to the Respondents, I do not find it significant that the Union has not formally requested the Respondents to recognize and bargain with it with respect to the live haul unit. When, on February 15, the Union, in a letter from organizer R. W. Brown to Holly Farms president Blake D. Lovette, did request recognition for a larger unit that the Union then considered appropriate[278] and had asked for an opportunity to demonstrate its card majority, the Respondents did not reply. Since then, the Respondents, unlike the

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[277](...continued)
facilities where the Union's representative status already was established.

[278] The Union, on February 15, had requested recognition for hatchery, live haul and feed haul employees at Wilkesboro, North Wilkesboro and Roaring River, North Carolina, and at four other locations.

Union, have continued to contest the appropriateness of the unit later found by the Board. The Respondents have made plain that they will continue to litigate the composition of the live haul unit, that they will not grant voluntary recognition to the Union; and, as found above, the Respondents have sought to counter the Union's organizational efforts by numerous unlawful acts.

Accordingly, the absence of a proper demand for recognition and bargaining does not foreclose the propriety of a bargaining order as a remedy for the Respondent's unfair labor practices,[279] and the absence

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[279] Color Tech Corporation, 286 NLRB 476.

of such a demand here can be excused as futile.[280]

Without regard to whether, as the Respondents seek to argue, employee turnover has sufficiently cured the effect of any employer misconduct so as to allow the conduct of a fair election,[281] such evidence would not remove the bases for a bargaining order. The unlawful conduct in this matter was participated in by the Respondents' highest officials, all of whom, at the time of the hearing, were still in either the same, or in substantially equivalent, positions.

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[280] Westinghouse Broadcasting and Cable, Inc., 285 NLRB 205, 214.

[281] At the hearing, consistent with Highland Plastics, 256 NLRB 146, 147; The Salvation Army Williams Memorial Residence, 293 NLRB, supra, at 944-945; International Door, Inc., 303 NLRB No. 94, sl. op. 6, the Respondents' proffered evidence concerning employee turnover was rejected.

Aspects of the Respondents' unlawful conduct also were directed at virtually every employee in the unit and, as noted, also at other groups of employees contiguous to the live haul unit. As the ranking members of management and virtually all supervisors and agents who were involved in the unfair labor practices still are in place and continue in charge of the Respondents' relevant operations; as the scope of their unfair labor practices show that the Respondents, through them, are firmly committed to their anti-union positions from which they are unlikely to retreat; and as these unfair labor practices were numerous, egregious and pervasive, it is foreseeable that new employees would learn of past practices and

also be deterred from seeking union representation.

Although time has passed since the Respondents' pattern of unlawful activity, the Board and courts have found that where, as here, the Respondents' unfair labor practices have been serious and pervasive and that conduct which could adversely influence employees in their freedom to choose a collective bargaining representative continued even after the representation election, the lasting effects of such conduct cannot be eradicated by the mere passage of time. While passage of time is regrettable, it is not a sufficient

basis for denying a bargaining order.[282]

From the many serious violations found, I conclude that the possibility of ending the effects of the Respondents' unfair labor practices and of conducting a fair election by the use of traditional remedies is slight. Requiring the Respondents simply to refrain from such conduct will not eradicate the lingering effects of the violations and an election will not reliably determine genuine, uncoerced employee sentiment. Therefore, I find that the employees' sentiments concerning representation, expressed here through authorization cards, would be better protected by

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[282] Quality Aluminum Products, 278 NLRB 388, 340, enfd. 813 F.2d 795 (C.A. 6, 1987).

issuance of a bargaining order than by traditional remedies.

Accordingly, the Respondents should be required to bargain with the Union as the duly designated representative in the live haul unit found appropriate, as of April 3, 1989,[283] the date the Respondents embarked on a clear course of unlawful conduct after the Union had acquired authorization cards from a majority of employees in the unit.[284]

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[283] On about April 3, live haul manager Ray Lovette began his series of meetings with live haul drivers during which he unlawfully interrogated them and solicited and promised to remedy their grievances.

[284] Color Tech Corporation, 286 NLRB, supra, at 478.

E. The Challenged Ballot and Objections to the Election in Case 11-RC-5583

(1)(a) The challenged ballot of Tony L. Clark—facts

At the election, the Board agent challenged the ballot of Tony L. Clark on the ground that his name did not appear on the voting eligibility list. Other ballots cast also were challenged on assorted grounds with a result that the challenged ballots were determinative. However, by early December, the challenges to all cast ballots, except that of Clark, had been resolved. The challenges to some ballots were sustained, but the challenges to 3 ballots were overruled and those ballots were opened, counted and a revised Tally of Ballots issued. The Revised Tally of Ballots showed that 95 votes had been

cast for and that 95 votes had been cast against the Petitioner, Local 391, and that it would be necessary to decide the sole remaining unresolved challenged ballot, that of Clark, in order to determine whether the Petitioner had obtained a majority of the valid votes cast in the election and, accordingly whether Local 391 should be certified as bargaining agent.

As noted, the Union asserts that Clark was eligible to vote because, during the payroll eligibility period and election, he shared a community of interest with employees in the live haul department. The Employers, arguing against Clark's eligibility, maintain that he did not work in live haul.

The circumstances of Clark's association with the live haul department, which lasted from April through November, were litigated in detail. For about 13 years before November, when he was transferred completely away from live haul to work under Tommy Robinson, sanitation manager in the Respondent's main processing plant, Wilkesboro, Clark had driven a spray truck used to wash down Company streets. He also spray washed around the Wilkesboro live haul exterior areas,[285] the administrative offices,

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[285] The live haul facilities around which Clark's truck washed consisted of office and scales areas leading to receiving docks. Trucks that brought in caged chickens just caught at growers farms, would pass over the scales and be unloaded and uncaged by plant workers near the receiving docks. Droppings, feathers, offal, blood, grease and other by-products of the unloading and plant production processes provided much to clean in the vicinity.

the executive office and plant parking lots, three hatcheries, the outside grounds and parking lot at the feed mills in Roaring River[286] and the sheds at the three service centers.

For more than 12 of Clark's first years on the spray truck, until April 1989, he worked out of the Holly Farms shave and spray department in an area about 2 miles from the Wilkesboro complex, called "the bottom." About 30 employees reported to work there. Ray Huffman, manager of

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[286] Roaring River, as described in the Regional Director's Supplemental Decision, is about 15 miles from the Wilkesboro complex. The Respondents' 21 feed mill workers produced feed which was driven by the 27 feed haul drivers to the contract growers' farms. The feed haul drivers' trucks were serviced by mechanics at Service Center No. 3, also located at Roaring River. These Roaring River employees, including those at the service center, all were included in the live haul unit.

the shavings department, whom Clark regarded as his supervisor while based at that department, related that, in 1989, his department had been assigned 11 shavings trucks and 5 spray trucks.[287] The shavings trucks, operated by six drivers, were used to pick up leftover wood chips from lumber yards and to carry these wood shavings to the growers' farms to be used to line chicken house floors. Seven more drivers were permanently assigned to the tank spray trucks. These trucks used hoses and nozzles to produce a moist fog to wash and disinfect the chicken houses. The sprays from those trucks

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[287] Huffman, however, regularly operated only 6 of the 11 shavings trucks and 4 of the 5 spray trucks—keeping 1 spray truck as a spare.

differed from the powerful, ground-directed currents produced by Clark's vehicle, intended to wash blood, offal, grease and, sometimes even truck oil, from the ground. The sprays from Clark's truck, if so directed, would have been strong enough to kill, drown or bruise the chickens and damage the chicken houses. While at "the bottom," and afterward, only Clark drove his spray truck. He did not interchange with other drivers. Shave and spray employees did not participate in the election among the live haul, feed mill, feed haul and Service Center No. 3 employees and Local 391 does not now seek to represent them.

At the "bottom," Clark clocked in and out at shave and spray and parked

his truck there at the end of his shift. Although Clark technically reported to Huffman during that period, Huffman actually was not there when Clark was on the job as Huffman worked from 7 a.m. to 5:30 p.m., while Clark worked from 7 p.m. to 3:30 a.m. As Clark's work was largely repetitive, he generally knew what he was expected to do. Huffman, as needed, would leave Clark messages with the security guards. While working out of shave and spray, Clark's compensation was changed to that department's payroll and he wore the same blue uniform as other shave and spray employees. His truck was serviced by Service Center No. 2, then located at "the bottom."

In performing his work, Clark followed a schedule prepared for him by Everett (Skipper) Solomon, then Holly Farms' vice-president for North Carolina operations.[288] Under this schedule, Clark, at Wilkesboro, usually took 4 hours to spray-wash the roads, parking areas and all grounds around live haul. He also took additional time to spray-wash around the processing plant which, like live haul and other above areas, he washed every day.

Clark spray-washed around the Roaring River feed mill, the hatcheries and the service centers at different intervals. The feed mill and

[288] After the merger, Solomon became the regional manager for Tyson's North Carolina operations, essentially continuing in the same position.

the three service centers[289] were washed every other week, and the hatcheries were washed once each week.[290]

Clark related that, on two or three occasions during his approximately 12 years at shave and spray, he was assigned by Huffman to wash down the chicken houses, at which

[289] The service centers were located as follows: Service Center No. 1, at the Wilkesboro main processing plant, serviced trucks used for long haul and live haul transportation. Service Center No. 2, at the shave and spray facility, about 2 miles from the Wilkesboro complex, maintained shavings trucks and the spray trucks kept there. Service Center No. 3, at Roaring River, approximately 15 miles from Wilkesboro, serviced feed mill, hatcheries and some pullet trucks. Employees at Service Center No. 3 were included in the live haul unit with the other applicable Roaring River employees.

[290] The hatcheries attended by Clark were at Broadway, Fair Plains and Hayes, located, respectively, 4, 5-6 and 10 miles from the Wilkesboro complex. Hatchery employees were excluded as agricultural from the live haul unit, although their inclusion originally was sought by the Union.

time he also used a hose affixed to his truck. While at shave and spray, he similarly used the hose attachment to wash the chicken cages and the flatbed trucks used to transport them.

Clark testified that while he still was at shave and spray, the Company moved many of the spray trucks, excluding his own, from that department to live haul where they no longer were driven by shave and spray personnel, but by employees assigned to live haul.

Clark averred that in April, Huffman told him that the Company was going to have to move him from "the bottom" to live haul because the night shift at shave and spray, on which he had been working, was being

ended and as he was the only night shift employee there. Clark was informed that he would start at live haul the next evening and would continue to work the same hours there as at shave and spray.

Accordingly Clark reported to the live haul department at the Wilkesboro complex the following evening where the personnel department gave him a timecard to use in conjunction with the live haul timeclock in the recreation room within the live haul building. Clark continued to punch in and out at that timeclock until his November transfer to the plant.

Clark testified that, after his timecard was moved to live haul, his job remained the same as before except that at live haul he, for the

first time, was called upon to do extra spray work. This included spraying anywhere there was a gas or oil spill. This included such spills in live haul or in the main processing plant areas, immediately adjacent to live haul. He, also for the first time, was expected to flush out the water-draining manholes to keep them from stopping up.

Clark continued to spray wash the same areas as before being moved to live haul, allocating about the same time periods to each location. The principal difference involved in the change was that, at live haul, he began to park his own car in a fenced lot used by live haul employees and on-premises U.S. Department of Agriculture representatives. His truck

no longer was parked at "the bottom" but was garaged at the former forklift shop at the Wilkesboro complex. The door to the forklift shop was modified to accommodate Clark's truck.

As described above, the live haul department and Roaring River employees who voted in the election were parts of the Respondents' live production division. Employees in that division also worked at the hatcheries; prepared and transported feed to the contract growers on whose farms the chickens were raised; washed down and, in the summer, water-cooled the chicken houses; and caught, caged and transported the chickens to the processing plant receiving areas.

Within the unit, the live haul chicken catching crews consisted of chicken catchers and live haul drivers, all of whom used the live haul timeclock at the Wilkesboro complex. As noted, the live haul drivers then would transport the chicken catchers to the growers' farms where the catchers would spend the rest of their shift manually catching and caging chickens. The filled chicken cages would be loaded onto flatbed trucks and driven by live haul drivers over the Wilkesboro live haul scales[29] to the unloading docks where the chickens were unloaded, stored in sheds and uncaged by plan workers who shackled them, inverted,

[29] The known weights of the trucks were subtracted from the gross weight to determine the weight of the load.

onto a conveyor leading into the plant. The live haul drivers then would return to the farms to pick up additional loads of caged chickens. At the end of the shifts, which varied in length based on the amount of work, the live haul drivers transported the catchers back to the Wilkesboro live haul area, where they all clocked out.

Clark never worked as a chicken catcher or as a live haul driver and his only function at Roaring River was to spray wash the above-described areas.

Clark's street washer spray truck differed from the approximately eight other spray trucks kept at live haul or at shave and spray in that his truck was a tandem vehicle with body

bolted to the chassis, while all, but two, of the other trucks were tractor-trailer vehicles with detachable tank-type trailers. These other two vehicles also were tandem. While Clark's truck was equipped underneath with nozzles, the trucks used in live haul had hoses with pumps. The hoses were unrolled at the frame to gently spray-cool the chickens. Apart from those differences, the trucks essentially were the same with rear water tanks.

The live haul spray trucks, used only in summer to wet cool the chicken houses and chickens, differed from the year-round spray washing and disinfecting function of the shave and spray trucks. Unlike shave and spray, live haul spray trucks were

not operated by permanently assigned drivers, but by live haul drivers not immediately working with chicken catching crews.

On nights when the weather was too cold to operate the spray trucks, Clark helped plant sanitation manager Robinson, on cleanup.

Clark's testimony that, during his months at live haul, he reported to Chris Shumate, the live haul scales operator, who would tell live haul crews what to do and take crews out, is disputed by the Respondents. According to Clark, on an occasion when his truck had a flat tire while at the Hayes hatchery, he called live haul, and spoke to Shumate. Shumate had told him to stay where he was and

notified the service center which sent someone to fix Clark's truck.

Shumate,[292] who worked from 4 p.m. to 1 a.m., denied that Clark had reported to him or that he had given Clark work instructions, including directions to blow out the manholes —which was done twice a week.

In addition to his work on the scales, Shumate, for the preceding 2 years, before leaving at the end of his workweek, had removed the old timecards from the rack and put in new ones because he was the last to leave. He left the removed timecards on the desk of live haul secretary Betty Lankford. However, Shumate

[292] Chris Shumate, employed by the Respondents for about 14 years, had worked the live haul scales for the last 2 years. Before then he had been a live haul driver.

would leave Clark's timecards in the rack as Clark had told Shumate that he would take care of that himself.[293]

Jerry Blevins, second shift manager of the main processing plant, Wilkesboro,[294] and plant sanitation manager, Tommy Robinson, who reported to Blevins, both testified that Robinson had been responsible for

[293] Shumate drove Clark's truck only once, when he picked it up from the shavings department for maintenance. He had never operated it as a spray truck.

[294] Blevins, who has held his position for about 8 years, was responsible for approximately 900 employees who reported to him through intermediate supervisors. Blevins related that, in spite of the large number of employees who worked under his general supervision, he knew Clark well from a time 15 years before when Blevins had been his line supervisor. Blevins' hours were from 2 p.m. to 4 a.m.

Clark's work for about 8 to 10 years.[295]

On August 10, Blevins had had occasion to discipline Clark. Having received employee complaints that Clark was taking too long on breaks, Blevins discovered, after checking, that Clark had stayed in the switch room near the grease trap, for 1 hour and 40 minutes. Blevins, joined by other plant supervisors, including Robinson, spoke to Clark in the switch room. Blevins told Clark that he had been where he was for the above-described period; that it would be necessary for Blevins to set a time for Clark to take his break; that Clark, thereafter, would take

[295] Plant employees, specifically sanitation workers under Robinson, were not included in the live haul.

his break from 11:30 p.m. to midnight; that his words constituted a warning; and that if he caught Clark on break at any time other than the specified period, he would dismiss him. Blevins then filed with the personnel office a written disciplinary notice recording this incident.[296]

Robinson, who worked from 7:30 p.m. until 6 a.m., had been plant sanitation manager for about 20 years, with sanitation responsibilities for the external and internal plant areas, live haul, the streets and the receiving and hanging docks.

[296] Blevins testified that when he wrote the August 10 disciplinary notice, he was not aware that Clark's ballot had been challenged at the July 27 election.

Robinson testified that, included in his long-term supervision of Clark was responsibility for approving Clark's vacations, which he could do only if a replacement was available. In 1988 and 1989, he could not find replacements and, therefor, could not permit Clark to take off requested time.

Robinson also set Clark's work priorities. Since the U.S. Department of Agriculture inspected the receiving areas at 6 a.m. daily, Clark would have to wash that area each night between midnight and 12:30 a.m. Although Clark did not work for live haul manager Ray Lovette, as testified to by both Lovette and Robinson, Lovette has called Robinson to ask him to get Clark to throw

water in drains to unstop them and to keep Clark from putting water on the scales.

Clark was paid at an hourly rate about 28 cents below that afforded the 93 employees under Robinson.[297] He continued to wear the same blue uniform as he had at shave and spray. This uniform also was worn by live haul employees and by Robinson's plant sanitation workers. Other plant workers wore white uniforms.

Robinson testified that the live haul timeclock used by Clark between April and November was used only by live haul employees, except for Clark and two women on cleanup.

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[297] Except for Clark and eight other employees who cleaned the upstairs part of the plant, trash trucks, etc., the remaining sanitation employees reported to Robinson through four supervisors.

Clark testified that, during the relevant time, he took his breaks in the live haul break room with chicken catchers, live haul drivers and fork-lift operators. This room also was used by Shumate and by second shift live haul superintendent Bryce Wilburn. When at Roaring River, he took breaks with feed mill and feed haul personnel.

Robinson, on the other hand, testified credibly that there were no break-time places established for cleanup employees and that Clark took his breaks wherever he was at the time, whether in live haul, at the switch room near the grease trap or out on his truck. Robinson related that, every night, a number of his other employees would take their

breaks in the live haul break room to gain access to vending machines not available at the plant.

Blevins testified that, in April, regional vice-president Solomon who, inter alia, oversaw the Wilkesboro complex, told him that the Company was going to relocate Clark so that he would punch in near the plant since his truck was going to be left in the forklift shop. In that way, Clark no longer would have to go to "the bottom," punch in and then come to the complex to work. Solomon also stated that Ray Huffman no longer would be telling Clark what to do and that Clark would be strictly under Tommy Robinson.

The record contains testimony that Clark had received a Company ring as

a safety award from live haul manager Ray Lovette, thereby tying Clark closer to the live haul operation. The clearest statement concerning this award came from Ray Huffman who testified that under Company policy, after 5 years of accident-free driving each driver was awarded a ring set with a ruby. For each year of safe driving thereafter, a diamond was set around the side of the ring.

Clark became entitled to a diamond addition to his ring for safe driving during the period from May 1, 1988, to April 30, 1989, and, accordingly, the award matured while Clark was still working out of shave and spray. The rings were distributed by a safety official at a supper held at the Elks' Club a week after Thanksgiving

1989. Huffman, on vacation at the time, did not attend the supper.[298]

The record contains conflicting testimony as to whether Clark had attended certain meetings of live haul employees between April and November, with Clark contending that he had, and others denying this. From the detailed evidence concerning Clark, I do not consider it necessary to resolve Clark's presence at these meetings to determine his status. As

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[298] Clark testified that while Huffman had sent the ring out to be fitted with another stone, the finished ring was given to him in April or May by live haul manager Ray Lovette at the end of a private meeting. However, Lovette denied having made the presentation or in having had anything to do with Clark's award. I credit Huffman's account because it is the most clearly-recalled, authoritative version. In addition, if the award had been given in April or May by Lovette, as described by Clark, it still necessarily would have been earned for work performed while Clark had been in shave and spray, and Lovette's role in passing it along, at most, would have been incidental.

explained by Lankford, Company payroll records coded Clark's street washer's classification during the relevant April-November interval to show that his pay was being charged to the overall Wilkesboro complex rather than to shave and spray, live haul or the plant.

In November, Clark's spray truck broke down and repairs were judged to be too expensive. Accordingly, as of November 30, Clark was transferred to plant sanitation under Robinson's general supervision; his driving was discontinued; his pay was increased by 28 cents/hour to the level of Robinson's other sanitation employees; and the Union does not contend that, after this transfer, Clark continued to be within the live haul unit.

I credit the Employers' evidence that Clark reported to both Huffman and Robinson before April, while still with shave and spray and that from April to November, after his timecard had been relocated to live haul, he continued to report principally to plant sanitation manager Robinson, subject to additional direction by Blevins. I find no convincing evidence that Clark ever was responsible to scales operator Shumate or to Ray Lovette, live haul manager.

These conclusions are supported by the facts indicating that Robinson and Blevins, alone of Clark's other attributed supervisors, worked hours that coincided with Clark's so as to allow effective knowledge of what

Clark was doing and what he still needed to do; that Clark's sanitation duties came squarely within Robinson's area of responsibility; that when the weather did not permit operation of the spray truck, Clark did plant sanitation work for Robinson; that, on August 10, it was Blevins, Robinson and other plant officials who participated in disciplining him. Although Clark's work was repetitive, closer supervision by Company officials who worked the same hours had importance because of the daily 6 a.m. U.S. Department of Agriculture inspection. I also find that Shumate's work had no inherent supervisory component requiring that he issue instructions involving the exercise of independent judgment. He

might inform a live haul driver when he was ready for that truck to drive across his scales and, possibly, could have pointed out some spills on the streets that Clark might want to spray-wash, but such actions would be routine in nature. Ray Lovette, whose regular work hours were in the daytime, also was not situated to have regularly and systematically supervised Clark. Accordingly, I find that from April-November, Clark was supervised and, as required, disciplined by plant officials Robinson and Blevins, and not by live haul personnel.

(b) The challenged ballot of Tony L. Clark— discussion and conclusions

As more recently restated in Keeler Brass Automotive Group, A Division of Keeler Brass Company:[299]

> . . . . whether individual employees are included in the bargaining unit as set forth in the election agreement depends on whether they share a sufficient 'community of interest' with other unit employees. In Kalamazoo Paper Box Corp., 136 NLRB 134 (1962), the Board enumerated the factors to be considered in determining whether individuals have a community of interest apart from other employees such that they would not belong in the same unit:
>
> > [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working tie spent away from the employment or plant situs . . .; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Applying the above criteria, I find that during the April-November period when Clark used the live haul timeclock and parked his car in that parking lot, he did not acquire a community of interest with the live haul or Roaring River unit employees sufficient to warrant his inclusion in that unit. Although Clark, during those months, continued to spray-wash around unit locations, including the live haul area, the scales, parking

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[299] 301 NLRB No. 114 (JD 18).

lots and the relevant Roaring River facilities, his duties also comprehended, as before, spray-washing premises unrelated to the unit. These included areas around the Company's administrative offices, three hatcheries, the main processing plant and Company streets quite removed from the live haul facilities.

The record indicates that Clark's relocation to live haul was an administrative measure to move him, as a functionally distinct employee, nearer to where he performed much of his work—the Wilkesboro complex, itself, rather than just to the live haul department. This was because, although he had performed essentially the same work for about 12 prior years while based at "the bottom,"

2 miles from the complex, there is no showing that he had been expected to spray-wash there. Accordingly, Clark had been taking round trip detours of at least 4 miles a day simply to use the timeclock and parking facilities of a place where he served no functional purpose.

Clark's relocation to the live haul facilities and vicinity did not functionally integrate him into the live haul work. His duties were completely unlike those of the chicken catching crews, including those of the 36 live haul drivers. While certain live haul drivers, during the warmest months, when not out with the chicken catching crews, would be assigned to drive tank trucks to the farms to spray-cool the chicken

houses and chickens, Clark claimed to have performed this cooling function only once in his 13 years of spray truck driving. At that time, it had been necessary to refit his truck with a hose and fine-spray nozzle, equipment he otherwise did not use.[300] Clark drove his street spray truck throughout the year while, as noted, the live haul drivers spray-cooled only incidentally to their regular work with chicken catching crews and, then, only in the summer. Clark, who never worked as a chicken catcher, did not interchange with the live haul drivers and was the only employee to drive his spray truck.

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[300] Clark claims that on two occasions while at shave and spray, he also used his truck, refitted, to wash chicken houses.

In fact, the record shows that except for those occasions when, as circumstances permitted, Clark was situated to use the live haul break room or the Roaring River break room for his rest periods, he had little contact with live haul unit employees. The solitary nature of his work separated him from other employees and, except for spray washing the exteriors, his functions were unrelated to the basic feed mill, feed haul work done by Roaring River employees. This situation is not materially changed by the fact that Clark might occasionally fuel his truck at Roaring River Service Center.

Clark's separation from live haul unit work and those who performed it was further exemplified by his as-

signment to do plant sanitation work under Robinson on nights when it was too cold to use his truck, rather than live haul/feed haul driving or some other assignment within the bargaining unit. This course was continued in November when he was permanently assigned to the plant after his truck's final breakdown, instead of to to a unit position.

While Clark was using the live haul timeclock and parking his car in its lot[301] his earnings were not charged to live haul, but to the

[301] The record shows that, in the late hours when Clark was parked in the lot while at work, the live haul lot was opened to others besides live haul workers and Department of Agricultural representatives.

Wilkesboro complex payroll, which premises he generally serviced.[302]

From the entire record, I find that Clark, while using the live haul timeclock, remained as functionally separate and distinct from the work and personnel of the live haul/Roaring River unit as when he had been operating the same spray truck, for essentially the same purposes, when based in shave and spray; that he had not shared a sufficient community of interest with members of the live haul/Roaring River unit to warrant

[302] The Union's argument that Clark "interacted" with feed mill and feed haul employees by cleaning around their areas and because his "K" pay code designation was shared with feed service employees is thin. Clark spent more time cleaning around other non-unit areas and his "K" code designation was broad enough to also include broiler farms employees, equipment installers, sanitation-supply employees and supervisors, shavings employees and guards.

his inclusion; and that the challenge to his ballot should be sustained and his ballot not be opened and counted.[303]

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[303] C. M. Carpenter, et al, d/b/a Carpenter Trucking, 266 NLRB 907, cited by the Union, is distinguishable. In Carpenter Trucking, supra, tank truck drivers were placed in the same unit with dump truck drivers because drivers of both types of trucks exercised like skills and because of similarities between certain of the two types of vehicles. In Carpenter Trucks, unlike here, there was considerable interchange between the two types of drivers. All tank truck drivers in Carpenter Trucks started with that Employer as dump truck drivers, and tank truck drivers occasionally drove dump trucks when the tanker business was slow. Before transferring from dump truck driving to tank truck driving, dump truck drivers received training by riding with tank truck drivers. Moreover, although there were differences in their respective work hours and in certain work conditions, as that decision reflects, each type of driver was work-dependent upon performance by the other. In the present matter, Clark was not functionally tied to or integrated in the work of the unit. Clark's use of his truck as the Company's only street washer was unique. He did interchange with other drivers or their vehicles, and unlike live haul and feed mill drivers, he did not work with other vehicle operators to achieve a similar purpose. There also is no evidence that Clark had operated a live haul or feed haul truck on his way to becoming a street wash spray truck operator.

2. The Objections to the Election in Case 11-RC-5583

With one exception, the Union's objections to the election closely parallel certain of the unfair labor practice allegations of the amended consolidated complaints where violations have been found; including, in effect, that the Respondents had ordered employees to cease from, and had threatened to have off-duty employees arrested for, union handbilling during non-worktime and in non-work areas; had coercively interrogated employees concerning their union activities and sympathies; had promised employee benefits and had threatened retaliation to discourage employee support for the Union. These unfair labor practices, found above, precluded the exercise of a

free and uncoerced choice in the election.

Only Objection No. 7 did not track complaint allegations and was separately litigated. Objection No. 7 alleges that:

> The Employer or its authorized representative was in the polling area campaigning during the time the polls were open.

In support of this objection, the Union contends that because, during hours when the July 27 polls were open in Wilkesboro and the election was being conducted, the Respondents' live haul office manager, Commie Johnson, spent extensive time in the break room which led directly to the immediate storage room voting place; that he electioneered while there; and that he entered the storage room

voting area on two occasions while that station was open to receive voters.[304]

The Respondents contend that it was not unusual for Johnson to be in the break room since it was necessary for him to pass through there to go to and from his office. Accordingly, he would be in the break room 20-25 times during a typical day.[305] The Respondents further point out that both of Johnson's visits to the immediate voting area were very brief,

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[304] Voting places were established at Wilkesboro and Roaring River for the July 27 election. The Wilkesboro voting was conducted at the storage room, Live Haul Office Building, from 7 a.m. to 10:30 a.m., and from 12 noon to 2:30 p.m. Only the Wilkesboro voting facility was involved in this election objection.

[305] Johnson would go through the break room from his office to get to the live haul scale, to check on the live chickens in the sheds and to get to the cage repair shop and back.

had been to enable him to supply certain items jointly requested by election observers and had occurred when no voters were in the voting place.[306]

As noted, the actual voting was conducted in a 13 by 26.5 foot storage room in the live haul office building located off one corner of the break room. The break room, at its shortest length, measured approx-

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[306] The Respondents, consistent with their position that live haul personnel are exempt agricultural workers, deny that Johnson, with responsibilities in live haul, was a supervisor within the meaning of the Act. However, the Respondents agree that Johnson otherwise met the criteria as to authority and function that would establish him as their supervisor and agent within the meaning of Section 2(11) and (13), respectively, of the Act if the personnel and work he supervised, in their view, had not been exempt. Since, as noted, the Board has found that live haul employees were not exempt but, properly, were included in the unit, I find that Johnson, who has held his position since 1986, at all material times, was the Respondent's supervisor and agent within the meaning of the Act.

imately 32 by more than 40 feet. Board election notices were posted outside each of the two break room entrances and, generally, voters used either of these two doorways to pass through the break room in order to reach the immediate voting place. Vending machines were situated along one side of the break room and the timeclock and card rack were along another wall. Three pool tables were spaced parallel to each other in the center of the room. A third entryway to the break room, not used by voters, opened to the clerical office area, adjacent to one side of the voting area/storeroom. The clerical office area, in turn, led to the of-

fice space used by live haul manager Ray Lovette and Johnson.[307]

Employees who, during the election, entered the break room used by most voters, proceeded the 32 feet across the width of the room, turned left and proceeded about another 10 feet to the voting place/storeroom entrance. Employees who used the other entryway would continue for more than 40 feet, then bear right and continue about 10 feet more up a corridor to the voting place entrance. Since, as noted, the door to the voting place was recessed up a

[307] Although Lovette and Johnson, as the Respondents indicate, would have had to pass through the clerical office area and break room while going to and from their own offices, they need not necessarily have done so while voting was in progress. Johnson conceded that he had not followed Ray Lovette's example in temporarily moving to a different office away from the the voting place during the election hours.

short corridor at an angle from the break room, apparently it would have been quite difficult to see into the immediate polling area from the break room.[308] As noted, however, the Board's election notices were posted outside the two doors to the break room used by voters coming to the polls, and the break room provided the only relevant access to the storeroom voting area.

Johnson testified that, during the July 27 voting hours, he was inside the break room 12 to 15 times, aggregating about 2 1/2 hours there. While there during the voting, he saw

[308] While employee Jerry A. Spicer, a union observer at the election, testified that it was possible to see into the storeroom/voting place from the break room, such testimony appears inconsistent with a detailed drawing of the area in evidence.

about 12 employees who apparently did not leave, but who simply remained, apparently loitering, and that he had seen an average of 8-10 employees at a time, lingering, using the vending machines and standing around the pool tables. Johnson engaged in small talk with nine or ten of the employees, discussing topics unrelated to the Union or to the voting, except that he did suggest to employee John Gilreath that Gilreath vote before starting work at 2 p.m. This was because the polls would be closed if Gilreath had waited until he returned to the facility.[109] Johnson denied

[109] I do not find Johnson's neutral statement to Gilreath suggesting that he vote before leaving, to constitute electioneering or, otherwise, to be of significance.

having seen anyone in the break room actually waiting to vote.

Johnson, recalling that James Isaac and Tony Bell were Company observers at the election and that Jerry Spicer and James Phillip Church were Union observers, testified as to how he had come to visit the storage room voting area twice during voting hours. He related that he first went to that voting place shortly before 8 a.m. in response to a request by Church and Isaac for ashtrays. Johnson brought some ashtrays from his office to the voting place and left. It is undisputed that he was in the voting place on that occasion for less than a minute.

The second visit was in response to a request, at around 8:30 a.m.,

for a fan, also by Church and Isaac. Johnson related that, when a fan could not be found in the building, an employee volunteered to bring one from home. After the employee produced the fan, Johnson took it into the voting place, plugged it into a socket, told the Board agent and observers that there was their fan and left. Again, Johnson was there not longer than a minute. Johnson testified without contradiction that no voters were in the polling room during either of his visits. Although the Board agent did not protest his presence, Johnson conceded that he had not identified himself.[310]

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[310] Union observer Spicer generally agreed with Johnson's testimony, but claimed that Johnson had identified himself to the Board agent as Ray Lovette's assistant when (continued...)

Johnson also explained the circumstances under which he had given out three baseball-type caps with the Tyson logo to employees in the break room while the election was in progress. When Tyson board chairman Don Tyson had visited the Wilkesboro facility in mid-July, soon after the takeover, certain employees who had seen him wear such a cap requested caps for themselves. Tyson promised to send them. A few days later, when the caps arrived, Johnson and other supervisors were instructed to distribute them and to tell the recipient employees that Don Tyson had sent them.

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[310](...continued) providing ashtrays during his first trip to the voting place, and that he had remained there on that occasion slightly longer than was described by Johnson.

Accordingly, 2 or 3 days before the election, the supervisors had given the Tyson baseball caps to each of their crew members. However, they left 15 to 18 caps, intended for certain employees they could not reach, in Johnson's office, requesting that he store and distribute them. Johnson thereafter gave about 15 of these caps to employees—handing out about 5 caps before July 27; approximately another 5 on the July 27 election date; and the same number after the election. Johnson testified, however, that on the day of the election, he only gave caps to employees who had requested them. In this fashion, Johnson gave three caps to employees in the break room while the polls were open. When the employees had

asked him for these caps, Johnson obtained them from his office and took them to the break room, telling the employees only that Don Tyson had sent them the caps.[311]

In accordance with Marathon Metallic Building Company,[312] Johnson's two brief visits to the storeroom voting area do not warrant setting aside the election. Whether or not Johnson identified himself as a supervisor to the Board agent, Johnson, on each occasion, had remained in the voting area for no more than a minute before leaving of his own accord. Both of his visits had been in response to joint requests by Company

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[311] At the end of the voting, the Company observers, as directed, did not sign the certificate approving conduct of the election.

[312] 224 NLRB 121, 125.

and Union observers for ashtrays and a fan for their use and the evidence indicates that no voters were present in the voting place while he was there. I do not find voter intimidation from these two incidents.

The remaining question in this area is whether Johnson's admitted conduct in passing out three Tyson baseball caps in the break room during voting hours to employees who had requested them constituted electioneering that would warrant setting aside the election. As restated by Administrative Law Judge Herzog in his Board-approved decision in Antenna Department West:[313]

> In Milchem, Inc., 170 NLRB 362 (1968), the Board concluded that, in order to prevent electioneering by parties to the election among employees preparing to vote, and to protect employees from distraction, pressure, and unfair advantage from prolonged conversations during the important final minutes before employees cast their ballots, a 'strict rule' against such conduct, without inquiry into the nature of the conversations, was warranted. The only exceptions announced to this rule were that trifling, chance, isolated, and innocuous comment or inquiry by an employer or union official would not necessarily void an election.

[313] 266 NLRB 909, 914.

Milchem, then, was intended to prevent electioneering by parties to the election among employees preparing to vote so as to protect them from the above undesirable consequences of such electioneering in the critical period just before the employees voted.

Here, there is no evidence showing either that employees who accepted the Tyson caps from Johnson had not asked for them,[314] or that any of the employees who received the caps, or who had witnessed their distribution, if any, had then been waiting to vote. Johnson was the only witness to testify concerning the distribution of these Tyson caps and, in the absence of evidence to the contrary, his account must be credited. From the foregoing, I conclude that Johnson's distribution of the Tyson baseball caps to three employees in the break room during the election does not warrant setting aside the election. Also, without condoning the extended time Johnson spent in the break room during voting hours, such conduct, by itself, similarly does not provide grounds for setting aside the election.

In view of the bargaining order found applicable herein, it is recommended that the election in Case 11-RC-5583 be set aside and that that representation proceeding be dismissed.

[314] Distribution by an employee of anti-union material is not unlawful absent some form of coercion or pressure on employees to receive the material. McDonalds', 214 NLRB 879, 881-883.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in section III, above, occurring in connection with the Respondents' operations described in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the

several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. The Respondents, Tyson Foods, Inc./Holly Farms Corporation, each are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Tyson Foods, Inc., at all material times herein since July 18, 1989, has been the successor to and proprietor of Respondent Holly Farms Corporation, succeeding to Holly Farms' bargaining obligation with the labor organizations named below, and shares with Holly Farms joint and several lia-

bility to remedy Holly Farms' unfair labor practices found herein.

3. Chauffeurs, Teamsters and Helpers Local Unions No. 29, 71, 355, 391, 592, 567 and 988, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein the Unions, are labor organizations within the meaning of Section 2(5) of the Act.

4. The Respondents violated Section 8(a)(1) of the Act by:

(a) Repeatedly threatening their long distance drivers that the transportation department in which they were employed would be closed if they chose the Unions as their bargaining agent.

(b) Repeatedly threatening their long distance drivers that if the Unions won, or even lost, the forthcoming representation election, the Respondents would take away the employees' jobs by selling all their trucks and by contracting out their hauling work.

(c) Repeatedly soliciting grievances from their employees and promising directly, or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Telling their employees that it would be futile for them to support the Union.

(e) Repeatedly threatening their employees with unspecified reprisals for having supported the Unions.

(f) Telling their employees to abandon the Unions in favor of forming a committee to negotiate with management concerning terms and conditions of employment.

(g) Promulgating, maintaining and enforcing a rule which prohibits employees from distributing materials in non-work areas on the Respondents' property during non-work hours.

(h) Respectively, threatening and causing the arrests of their employees for distributing union materials in non-work areas on the Respondents' property during non-work hours.

(i) Informing their employees that other employees had been arrested for distributing union materials

in non-work areas of the Respondents' premises during non-work hours.

(j) Threatening their employees with discharge should they distribute union materials in non-work area of the Respondents' premises during non-work hours.

(k) Repeatedly disciplining their employees by issuing written warnings to them because of their union activities.

(l) Promulgating, maintaining and enforcing a rule which prohibited their employees from discussing wages with other employees.

(m) Threatening to retaliate against their employees by assigning them less mileage, thereby reducing earnings, because they chose the

Unions as their bargaining representative.

(n) Repeatedly coercively interrogating their employees concerning their union activities, sympathies and desires.

(o) Prohibiting employees from wearing union hats or insignia and by threatening retaliation for such conduct.

(p) Discriminatorily prohibiting the posting of union materials on the Respondents' bulletin boards.

(q) Threatening their employees with discharge if they should chose the Unions as their bargaining agent.

(r) Threatening their employees that other employees who were prominently active for Local 391 would be discharged should the employees not

choose the Union as their bargaining agent.

(s) Threatening their employees that the Respondents' management would know how they voted in the scheduled representation election should they choose Local 391 to be their bargaining agent.

5. The Respondents, in order to discourage union membership and activities, violated Section 8(a)(3) and (1) of the Act by:

(a) Discriminatorily discharging their employees Alvin Bouchelle, Patricia Barker, Raymond K. Huffman, Jr., and Joseph Richardson.

(b) Constructively discharging their 47 employees named below:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne

Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn

Jerry Miller
Michael Simmons
Mike Staley

(c) Discriminatorily disciplining their employees James Phillip Church, Gene Hester, Teddy Ray Hayes and Harden Branscome by the issuance of written warnings.

(d) Discriminatorily granting their live haul unit employees a pay raise shortly before a scheduled representation election.

6. The following employees of the Respondents constitute an appropriate unit for bargaining under Section 9(a) of the Act:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Com-

> panies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Sequin and Center, Texas, excluding all office clerical employees, guards and supervisors as defined in the Act.

7. At all times since March 24, 1989, the seven above-named Teamsters local unions, herein the Unions, have been, and are, the exclusive jointly-certified representative of the employees in the above-described unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

8. The Respondents violated Section 8(a)(5) and (1) of the Act on and after August 8, 1989, by:

(a) Announcing to the Unions that they were going to unilaterally

integrate their employees within the former Holly Farms transportation department western division, into the Tyson transportation system.

(b) Announcing to the Unions that the former Holly Farms eastern transportation division would be unilaterally reduced by the layoff of 71 drivers and the removal of 47 tractors.

9. The Respondents violated Section 8(a)(5) and (1) of the Act on and after September 12, 1989, by:

(a) Announcing to the Unions, respectively, that they unilaterally were going to completely integrate the former Holly Farms transportation department, eastern and western divisions, into the Tyson transportation system; that the Respondents uni-

laterally were going to change the wages, work locations, hours of employment and other terms and conditions of employment of the bargaining unit employees, while offering to bargain only about the effects of such decisions.

(b) Bypassing the Unions and negotiating directly with unit employees concerning their wages, hours and other terms and conditions of employment.

(c) Withdrawing recognition from the Unions as the exclusive collective-bargaining representatives of the employees in the above-described unit, and, thereafter, by failing and refusing to recognize the Unions as the exclusive collective-bargaining

representative of the employees in the said unit.

(d) Failing and refusing to provide the Unions with a copy of the requested merger agreement between Tyson Foods, Inc., and Holly Farms Corporation.

10. The Respondents violated Section 8(a)(5) and (1) of the Act on and after September 22, 1989, by:

(a) Effectuating the previously-announced integration of the former Holly Farms transportation department, eastern and western divisions, into the Tyson transportation system.

(b) Unilaterally changing the wages, hours, work locations and other terms and conditions of employment of employees in the above-described unit.

(c) Constructively discharging the 47 above-named unit employees for refusing to continue their employment with the Respondents under the unilaterally-imposed wages, hours and other conditions of employment.

(d) Unilaterally changing the absentee call-in policy as to when employees, to avoid discharge, must report their absences to the Respondents.

(e) Announcing to employees that, at a specified later date, the existing Holly Farms pension plan covering bargaining unit employees would be unilaterally discontinued and the proceeds paid out.

11. The strike that began on October 1, 1989, is a protected unfair labor practice strike caused by the

Respondents' above-described unfair labor practices.

12. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

13. On or about March 31, 1989, Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein the Union, separately repre-

sented a majority of the employees in the unit described immediately above and, since that date, has been the exclusive representative of all such employees for purposes of collective bargaining.

14. The Respondents have violated Section 8(a)(5) and (1) of the Act by failing and refusing, since April 3, 1989, to recognize and bargain with the above-named Union as the exclusive bargaining representative of the employees in the immediately above-described unit.

15. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

16. The Respondents' unlawful conduct interfered with the representa-

tion election held on July 27, 1989, in Case 11-RC-5583.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. For the reasons set forth above, I shall recommend that the Respondents be ordered, upon request, to bargain collectively with the seven above-named Teamsters local unions as the jointly-certified exclusive bargaining representative of the employees in the above-described drivers-yardmen unit, and with Local 391 as the exclusive collective-bargaining repre-

sentative of the employees in the above-described unit which includes live haul employees.

Since the Respondents, under current Tyson management, have not honored the certification of representative which the Board issued to the seven above-named Teamsters local unions on March 24, 1989, I will recommend that the certification year be extended to run for a period of 1 year commencing from the date the Respondents begin to bargain in good faith and that the Respondents be required to bargain with the Unions during that period as if the year following certification had not expired.[315]

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[315] Mar-Jac Poultry Company, 136 NLRB 785; Hydrotherm, Inc., 302 NLRB No. 153 (JD 21).

Having found that the Respondents breached their bargaining obligations under the Act with respect to the drivers-yardmen unit by withdrawing recognition from the Unions as the certified bargaining representative of the employees in that unit and by instituting unilateral changes affecting wages, hours, work locations and other terms an conditions of employment, and to restore as nearly as possible the status quo ante, I shall recommend that the Respondents, upon request, be required as to its employees within the drivers-yardmen unit, as amended above, to recognize and bargain with the Unions and to reinstate the work scheduling, rates of pay, road fees and benefits plans and the work rules that had been in

effect for such employees on September 12, 1989, before the Respondents' unlawful unilateral changes. The Respondents also should be required to make whole its employee-members of the drivers-yardmen unit for any losses they may have sustained since September 22, 1989, by having been unlawfully required to work since that date under the Respondents' unilaterally-imposed unlawful changes by paying to those employees sums equal to what they would have earned from mileage driven and/or from other forms of compensation under the pay and benefits plans and road fee schedules, as available to them on September 12, and their earnings under the Tyson Pay and Benefits plans and road fee schedules since Septem-

ber 22, 1989.[316] Any such earnings differentials should be computed to the extent appropriate as prescribed in Ogle Protection Service, Inc.[317]

Having found that Respondents unlawfully discharged Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle and Joseph Richardson, and

[316] Contrary to the Respondents, I find that the unit drivers' backpay entitlements were not reduced because Tyson assertedly had offset its unilateral reductions in mileage rates and other forms of compensation by requiring that its employees accumulate more lower paid mileage each pay period than had Holly Farms, which policy resulted in greater gross earnings. The unnegotiated extra mileage required by Tyson, in itself unlawful, should not obscure the unilateral changes which deprived the drivers of previously-available higher mileage rates and of other fees favorably affecting their earnings while requiring less work.

[317] 183 NLRB 682. As the record indicates that changes in pay rates, road fees, work locations, work scheduling and other terms and conditions of employment occurred on different dates for eastern and western division unit employees, it will be left to the compliance stage of this proceeding to determine precisely when such changes, respectively, occurred in determining applicable retroactivity dates.

that, on September 22, 1989, they constructively discharged the 47 above-named employees, and have refused to reinstate all of the foregoing, the Respondents should be required to offer all of the aforesaid individuals, whether directly or constructively discharged, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make each of them whole for any loss of earnings suffered as a result of the Respondents' unlawful conduct by payment of sums equal to those which they would have earned absent the unlawful conduct against them, with backpay and

interest computed in accordance with the formula set forth in F. W. Woolworth Company,[318] with interest as computed in New Horizons for the Retarded.[319]

While the Respondents, upon request, should be required to rescind unilateral changes affecting the drivers-yardmen unit since September 22, 1989, this should not be construed as requiring the Respondents to cancel any wage increases or other

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[318] 190 NLRB 289.

[319] 283 NLRB 1173. In accordance with the decision in New Horizons for the Retarded, supra, interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621. The foregoing reinstatement and make-whole remedies also should be applied to any employees who were discharged or otherwise disciplined by virtue of the unilaterally-changed absentee call-in policy found unlawful above, or pursuant to other unlawfully changed work rules.

improvement in wages without request from the Unions.

Having also found that the Respondents unlawfully issued written warnings to employees Harden Branscome, Teddy Ray Hayes, Gene Hester and James Phillip Church, they should be required to rescind those warnings. References to all disciplinary proceedings found unlawful herein, whether to the aforesaid warning notices, to the above-noted discharges and constructive discharges, or to any employees disciplined under unlawfully changed policies and work rules, should be removed from the personnel files of the affected employees, and such disciplinary actions should not be considered in any future personnel actions against

these employees. The affected employees should be notified in writing that such expunction has been completed.

Having found that the Respondents have failed and refused to furnish the Unions with a copy of the merger agreement between Tyson Foods, Inc., and Holly Farms Corporation, as requested, and that such document is necessary to the performance of the Unions' bargaining responsibilities, the Respondents, upon request, should be required to provide the Unions with a complete copy of that document.

Having found that the Respondents unlawfully announced that the pension plan in effect for employees as of September 22, 1989, will be termi-

nated and paid out at a specified later date, the Respondents should be required, upon request, to rescind that announcement and bargain with the above-named Unions concerning retirement plans. If applicable, the Respondents should be required to reinstate the original pension plan retroactively to the date on which it was discontinued and make whole any employees adversely affected by that unlawful unilateral change.

Having found that the Respondents unlawfully changed their absentee call-in policy by requiring that, to avoid discharge or other discipline, employees must call in to report their absences to the Respondents within 2 days instead of 3 days, as before, the Respondents, upon re-

quest, should be required to rescind this unilaterally changed policy and bargain with the above-named Unions concerning absentee call-in requirements.

As a bargaining order has been found appropriate with respect to the unit which includes live haul employees, it is recommended that the election held in Case 11-RC-5583 be set aside and that the petition in that matter be dismissed.

Since the strike herein has been found to be an unfair labor practice strike, upon their unconditional application to return, the Respondents shall be required to offer immediate reinstatement to all striking employees to their former positions or, if those positions no longer exist, to

substantially equivalent positions, without loss of seniority and other rights and privileges, dismissing, if necessary, any persons hired as replacements on or after October 1, 1989. Backpay for such striking employees shall commence 5 days after they respectively make unconditional application to return to work and continue to accrue until the date when the Respondents offer reinstatement, in the absence of lawful justification for the Respondents' failure to make such an offer.[320] In the event that backpay for striking employees becomes applicable because of the Respondents' unjustified refusal to offer reinstatement to those who

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[320] Drug Package Company, Inc., 228 NLRB 108.

should make unconditional application for same, such backpay shall be calculated in the manner previously set forth for discharges in this Remedy section.

As the unfair labor practices found herein are serious, pervasive, numerous and calculated, affecting employees in more than two bargaining units, and are attributable to the highest levels of the Respondents' management, it is clear that the Respondents have evidenced a readiness to violate the Act to such degree as to warrant recommending that the Respondents be restrained by a broad cease and desist Order.[321]

Upon the foregoing findings of fact, conclusions of law, and the

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[321] Hickmott Foods, Inc., 242 NLRB 1357.

entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[322]

ORDER

The Respondents, Tyson Foods, Inc. /Holly Farms Corporation, jointly and severally, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening their employees that the departments in which they are employed will be closed if they should choose Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 567, 592 and 988, affili-

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[322] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein the Unions, or any other labor organization, as their bargaining agent.

(b) Threatening their employees that, whether or not they choose the above-named Unions as their bargaining agent, the Respondents will take away their jobs by selling the trucks they drive and by contracting their hauling work to outside concerns.

(c) Soliciting grievances from their employees and promising, directly or by implication, to adjust them in order to induce their employees to abandon the Union.

(d) Informing their employees that it would be futile for them to

join or support the above-named Unions, or any other labor organization.

(e) Threatening their employees with unspecified reprisals for having supported the above-named Unions.

(f) Advising their employees to abandon the above-named Unions in favor of forming a committee to negotiate with the Respondents with respect to wages, hours and other terms and conditions of employment.

(g) Establishing, maintaining and enforcing a rule which prohibits their employees from distributing union materials in non-work areas of the Respondents' premises during non-work hours.

(h) Respectively, threatening their employees with arrest and caus-

ing their employees to be arrested or distributing union materials in non-work areas of the Respondents' premises during non-work hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in non-work areas of the Respondents' premises during non-work hours.

(j) Threatening their employees with discharge should they distribute union materials in non-work areas of the Respondents' premises during non-work hours.

(k) Establishing, maintaining and enforcing a rule which prohibits their employees from discussing their pay rates with each other.

(l) Threatening to retaliate against the employees by assigning

them less mileage, and thereby lessening earnings, because they chose the Unions as their bargaining representative.

(m) Coercively interrogating their employees concerning their union activities, sympathies and desires.

(n) Prohibiting their employees from wearing union hats or insignia.

(o) Threatening their employees with retaliation for wearing union hats or insignia.

(p) Discriminatorily prohibiting their employees from posting union materials on Respondents' bulletin boards.

(q) Threatening their employees with discharge should they choose the

above-named Unions as their collective-bargaining agent.

(r) Threatening their employees that other employees who were active for Local 391, above, would be discharged should the employees not choose that Union as their bargaining agent.

(s) Threatening their employees that the Respondents' management would know how they voted in a scheduled representation election should they choose a Union as their bargaining agent.

(t) Discouraging membership in a labor organization by discharging and /or constructively discharging employees; and by issuing written warnings to their employees for engaging in union activities; and by discrimi-

natorily granting their employees special pay raises.

(u) Refusing to recognize and, upon request, to bargain with the above-named Unions as the exclusive collective-bargaining representative of their employees in the following appropriate unit:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Carthage, Seguin and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

(v) Refusing to recognize and bargain with the above-named Unions

as the exclusive bargaining representative of their employees in the above-described unit by unilaterally announcing and notifying their employees of intended reductions in personnel and equipment affecting bargaining unit personnel; by unilaterally merging the above-described bargaining unit into a larger group of the Respondents' employees; by unilaterally relocating unit employees and changing their rates of pay, hours of work and other terms and conditions of employment; by unilaterally withdrawing recognition from the Unions as bargaining agent for employees in the above-described unit; by bypassing the Unions and bargaining directly with unit employees; by failing and refusing to fur-

nish the Unions with a complete copy of the Tyson Foods, Inc./Holly Farms Corporation merger agreement; and by constructively discharging their employees who have refused to accept the Respondents' unlawfully changed terms and conditions of employment.

(w) Refusing to recognize and, upon request, bargain with Teamsters Local Union No. 391 as the exclusive bargaining representative of its employees in the following appropriate unit:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards

and supervisors as defined in the Act.

(x) Discouraging membership in a labor organization by discharging or constructively discharging, their employees; by issuing written warnings to their employees for engaging in union activities; and by discriminatorily granting pay raises.

(y) Refusing to recognize and bargain with Teamsters Local Union No. 391 as the exclusive bargaining representative of their employees in the appropriate unit described immediately above by announcing to their employees who are members of that unit that the existing pension plan will be unilaterally terminated at a later date; and by unilaterally changing the absentee call-in policy as to when employees, to avoid dis-

charge or discipline, must report their absences to the Respondent.

(z) In any other manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Recognize and bargain, upon request, with Teamsters Local Unions Nos. 29, 71, 355, 391, 567, 592 and 988 as the exclusive collective-bargaining representative of its employees in the bargaining unit which includes drivers-yardmen, set forth above, with respect to wages, hours and other terms and conditions of employment and, if an understanding is

reached, embody such understanding in a signed agreement.

(b) Offer Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle, Joseph Richardson and the 47 constructively discharged employees named below, and any employees disciplined under unlawfully changed policies or work rules, immediate reinstatement to their former positions and if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for the discrimination against them in the manner set forth in this decision entitled "The Remedy." The 47 constructively discharged employees entitled to this remedy are:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Doliar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson

David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

(c) Rescind the written warning previously given to James Phillip Church, Gene Hester, Teddy Ray Hayes and Harden Branscome, and remove from its records any reference to the above discharges, constructive discharges, written warnings, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and notify each affected employee, in writing, that this has been done and that such discharges, constructive discharges, written warnings and/or discipline, and the reasons therefor, shall not be used

as bases for future personnel actions against them.

(d) Upon request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits and other terms and conditions of employment made on and after September 22, 1989, affecting employees in the above-described unit which include drivers-yardmen, retroactively to September 22, 1989, or whenever such changes became effective, except that employees need not be relocated, and make their unit employees whole, with interest, for any losses sustained due to the Respondents' unlawfully-imposed changes in wage rates, hours of work, road fees, job benefits and other terms and conditions of employment, since the effective

dates of these unlawful changes, in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Furnish, upon request, to the seven above-named locals unions a copy of the merger agreement between Tyson Foods, Inc., and Holly Farms Corporation.

(f) Recognize and bargain, upon request, with Local 391 as the exclusive collective-bargaining representative of their employees in the bargaining unit set forth above, which includes live haul employees, with respect to wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(g) Rescind, upon request, the Respondents' announcement that the pension plan in effect for employees in the above-described units would be unilaterally discontinued on or about September 22, 1991, and, if applicable, reinstate the original plan retroactively to its date of discontinuation, making whole any adversely affected employees and, upon request, bargain with the above-named Unions concerning retirement plans.

(h) Upon request, rescind the unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, employees must communicate their absences to the Respondent within 2 days instead of 3 days, as before, and bargain

with the above-named Unions concerning absentee call-in requirements.

(i) Upon unconditional application to return, offer to any employee who participated in the strike commencing October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989. Further, make whole such employees, with interest, for any loss of earnings suffered by reason of the Respondents' refusal, if any, to reinstate them in the manner set forth in the section of this Decision entitled "The Remedy."

(j) Post at all their various facilities, including those in Wilkesboro, Roaring River and Monroe, North Carolina; Harrisonburg, Temperanceville and Glen Allen, Virginia; and Carthage, Seguin and Center, Texas, copies of the attached notice, marked "Appendix."[323] Copies of the notice, on forms provided by the Regional Director for Region 11, after being duly signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous

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[323] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS ORDERED that the complaints herein be dismissed insofar as they allege violations of the Act not specifically found herein.

IT IS FURTHER ORDERED that the election held on July 27, 1989, in Case 11-RC-5583 hereby is set aside

and that the petition in that matter is dismissed.

Dated, Washington, D.C. March 12, 1992

Robert M. Schwarzbart
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the
United States Government

AFTER A TRIAL IN WHICH WE WERE REPRESENTED BY OUR ATTORNEYS AND IN WHICH ALL SIDES PRESENTED EVIDENCE, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS. TO CORRECT AND REMEDY THESE VIOLATIONS, WE HAVE BEEN DIRECTED TO TAKE CERTAIN ACTIONS AND TO POST THIS NOTICE.

WE WILL NOT refuse to bargain collectively, upon request, with CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNIONS NOS. 29, 71, 355, 391, 567, 592 and 988, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, as the exclusive joint bargaining representative of

our employees in the appropriate bargaining unit described herein, which they represent, concerning wages, hours, and other terms and conditions of employment. The appropriate unit is:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through our terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at our facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Carthage, Seguin and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT threaten that the department in which you are employed will be closed should you choose the above-named Unions, or any other labor organization, as your bargaining agent.

WE WILL NOT threaten that, whether or not you choose the above-named labor organizations as your bargaining agent, that we will take away your jobs by selling the trucks that you

drive and by contracting your hauling work to outside carriers.

WE WILL NOT solicit grievances from you and promise, directly or by implication, to adjust them in order to induce you not to select the above-named Unions, or any other labor organization.

WE WILL NOT inform you that it would be futile to join or support the above-named Unions, or any other labor organizations.

WE WILL NOT threaten you with unspecified reprisals for having supported the above-named Unions, or any other labor organization.

WE WILL NOT advise you to stop supporting the above-named Unions in favor of forming a committee to negotiate with our management with respect to wages, hours and other terms and conditions of employment.

WE WILL NOT establish, maintain and enforce a rule which prohibits you from distributing union materials in non-work areas of our premises during non-work hours.

WE WILL NOT threaten you with arrest and WE WILL NOT cause you to be arrested for distributing union materials in non-work areas of our premises during non-work hours.

WE WILL NOT inform you that other employees have been arrested for distributing union materials in non-work areas of the our premises during non-work hours.

WE WILL NOT threaten you with discharge should you distribute union materials in non-work areas of the our premises during non-work hours.

WE WILL NOT establish maintain and enforce a rule which prohibits you from discussing your pay rates with other employees.

WE WILL NOT threaten to retaliate against by assigning you less mileage, thereby lessening your earnings, because you selected the above-named Unions as your bargaining agent.

WE WILL NOT coercively interrogate you concerning your union activities, sympathies and desires.

WE WILL NOT prohibit you from wearing union hats or insignia.

WE WILL NOT threaten you with retaliation for wearing union hats or insignia.

WE WILL NOT discriminatorily prohibit you from posting union materials on our bulletin boards.

WE WILL NOT threaten discharge should you choose the above-named Unions as

your collective-bargaining representative.

WE WILL NOT refuse to recognize and bargain with the above-named Unions as the exclusive collective-bargaining representative of our employees in the above-described appropriate unit by by unilaterally announcing and notifying our employees of intended reductions in personnel and equipment affecting bargaining unit personnel; by unilaterally merging the bargaining unit into a larger group of our employees; by unilaterally relocating unit employees and changing their rates of pay, hours of work and other terms and conditions of employment; by unilaterally withdrawing recognition from the above-named Unions as bargaining agent for the employees in the aforesaid unit; by bypassing the above-named Unions and bargaining directly with unit employees; by failing and refusing to furnish the above-named Unions with a complete copy of the Tyson Foods, Inc./Holly Farms Corporation merger agreement; and by constructively discharging our employees who have refused to accept our unlawfully changed terms and conditions of employment.

WE WILL NOT refuse to bargain collectively, upon request, with CHAUFFEURS, TEAMSTERS, AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND

HELPERS OF AMERICA, AFL-CIO, herein LOCAL 391, as the exclusive bargaining representative of our employees in the appropriate bargaining unit herein, which they represent, concerning wages, hours and other terms and conditions of employment. The appropriate unit is:

> All live haul employees (chicken catching crews) employed at our processing facility located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at our facility located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT threaten that employees who were active for Local 391 will be discharged for their union activities should the employees not choose the Union as their bargaining agent.

WE WILL NOT threaten that our management will know how you voted in a scheduled representation election should you choose LOCAL 391, or any other labor organization, to be your bargaining agent.

WE WILL NOT discourage membership in a labor organization by discharging, or constructively discharging you; by

issuing written warnings to you for engaging in union activities; and by discriminatorily granting you pay raises.

WE WILL NOT refuse to recognize and bargain with LOCAL 391 as the exclusive bargaining representative of the employees in the appropriate unit described immediately above by announcing to our employees who are members of that unit that the existing pension plan will be unilaterally terminated at a later date; and by unilaterally changing the absentee call-in policy as to when our employees, to avoid discharge or discipline, must communicate their absences to us.

WE WILL NOT in any other way, interfere with, restrain or coerce you in the exercise of your under rights under Section 7 of the Act.

WE WILL, upon request, recognize and bargain with TEAMSTERS LOCAL UNIONS NOS. 29, 71, 355, 391, 567, 592 AND 988 as the exclusive collective-bargaining representatives of our employees in the above-described unit which includes drivers-yardmen, and WE WILL, upon request, recognize and bargain with TEAMSTERS LOCAL UNION NO. 391, as the exclusive bargaining representative of our employees in the above-described unit which includes live haul employees, with respect to wages, hours and other terms and conditions of employment and, if

an understanding is reached with respect to either or both units, embody such understanding in a signed agreement or agreements.

WE WILL, upon request, furnish the above-named Unions, in timely fashion a copy of the merger agreement between Tyson Foods, Inc., and Holly Farms Corporation, and any other information which is relevant for purposes of collective bargaining.

WE WILL offer PATRICIA BARKER, RAYMOND K. HUFFMAN, JR., ALVIN BOUCHELLE and JOSEPH RICHARDSON, whom we have unlawfully discharged, and the 47 employees named below, whom we have unlawfully constructively discharged, immediate reinstatement to their former positions, and, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss they may have suffered by reason of our discrimination against them. The 47 employees also entitled to this remedy are:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn

James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

WE WILL rescind the discriminatory written warnings previously given to our employees, JAMES PHILLIP CHURCH, GENE HESTER, TEDDY RAY HAYES and HARDEN BRANSCOME.

WE WILL remove from our files any reference to the above discharges, constructive discharges, written disciplinary notice and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and WE WILL notify the affected employees in writing that this has been done and that such evidence of our unlawful conduct will not be used as bases for future personnel actions against them.

WE WILL, upon request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits and other terms and conditions of employment made on and after September 22, 1989, affecting our employees in the above unit which includes drivers-yardmen, retroactively to September 22, 1989, or to when such changes became effective, except that employees need not be relocated, and WE WILL make our employees whole, with interest, for any losses sustained due to our unlawfully-imposed changes in wage rates, road fees, benefits plans and other terms and conditions of employment, since the effective dates of these unlawful changes.

WE WILL, upon unconditional application to return, offer, to any employee who participated in the strike that began on October 1, 1989, full and immediate reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989, and WE WILL make any such employee whole, with interest, for any loss of earning suffered by reason of our refusal, if any, to provide reinstatement.

WE WILL rescind our announcement that the pension plan in effect for employees in the above-described units as of September 22, 1989, will be unilaterally terminated at a later date and, if applicable, WE WILL reinstate the original pension plan retroactively to the date on which it was discontinued and WE WILL make whole any employees adversely affected by our unlawful unilateral change. WE WILL, upon request, bargain with the above-named Unions concerning retirement plans.

WE WILL, upon request, rescind our unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, you must call us to report your absences within 2 days instead of 3 days, as before, and WE WILL bargain with the

above-named Unions concerning absentee call-in requirements.

TYSON FOODS, INC./HOLLY FARMS CORPORATION
(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 251 North Main Street, Room 447, Winston-Salem, North Carolina 27101-3986, Telephone 919--631-3212.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 9, 1995

No. 93-1710
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13267
11-CA-13184

HOLLY FARMS CORPORATION; TYSON FOODS, INCORPORATED
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD;
Respondent

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391, 29, 71, 355, 592, 657, 988, and all affiliated with the International Brotherhood of Teamsters,
Intervenor

No. 93-1882
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13487
11-CA-13267
11-CA-13184

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

HOLLY FARMS CORPORATION; TYSON FOODS, INCORPORATED;
Respondents

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391, 29, 71, 355, 592, 657, 988, and all affiliated with the International Brotherhood of Teamsters,
Intervenor

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Petitioners' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 17, 1995

No. 93-1710
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13267
11-CA-13184

Holly Farms Corp v. NLRB

No. 93-1882
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13487
11-CA-13267
11-CA-13184

NLRB v. Holly Farms Corp

M A N D A T E

The judgment of this Court dated

3/10/95 takes effect today.

BERT M. MONTAGUE
CLERK

RELEVANT STATUTORY PROVISIONS

1. Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3), provides:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any

other person who is not an employer as herein defined.

2. Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)-(3).

3. Section 8(a) of National Labor Relations Act, as amended, 29 U.S.C. § 158(a), provides:

(a) It shall be an unfair labor practice for an employer -

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
> ...
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization... .
> ...
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

4. Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a), provides:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

other conditions of employment... .

5. Section 3(f) of the Fair Labor Standards Act (hereinafter "FLSA"), 29 U.S.C. § 203(f) (1978) (Addendum G), defines "agriculture" as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 114-1j(g) of Title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(6)

Supreme Court, U.S.
FILED
SEP 5 1995
CLERK

No. 95-210

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFEURS, TEAMSTERS AND HELPERS,
et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERVENORS' BRIEF IN OPPOSITION

J. David James
Smith Follin & James, L.L.P.
P.O. Box 990
Greensboro, NC 27402
(910) 274-2992
Counsel for Intervenors/
Respondent

43 pp

QUESTIONS PRESENTED

1. Did the Petitioner Tyson Foods become legally obligated to bargain with the unions representing the employees of Petitioner Holly Farms following its purchase of the stock of Holly Farms on July 18, 1989?

2. Did the NLRB and the Fourth Circuit Court of Appeals properly require Petitioners to negotiate over the effects of their decision to transfer the driver/yardmen employees to Petitioner Tyson Foods?

3. Was the NLRB's remedy of reinstatement and back pay proper for employees who were unlawfully discharged?

4. Did the NLRB properly exercise its expertise in determining, under the facts in this case, that live haul drivers, forklift drivers and chicken catchers are not agricultural employees?

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STATEMENT OF THE CASE AND FACTS

The NLRB found that the Petitioners had committed dozens of unfair labor practices. Petitioners did not appeal most of those findings to the Fourth Circuit and raise even fewer in their Petition for Writ of Certiorari. This Statement of Facts discusses only those facts important to the issues raised by Petitioners.

A. The Driver/Yardmen Unit.

On March 27, 1989[1] the NLRB certified the Intervenors as the exclusive bargaining representative for the employees in the driver/yardmen unit. Shortly thereafter, the Intervenors and Holly Farms began negotiations for a collective bargaining agreement. The parties met numerous times during the late spring and early summer and had scheduled negotiations for July 10 through 12. Just prior to July 10, Jesse Hogg, the chief negotiator for Holly Farms,

[1]All dates are 1989 unless otherwise noted.

called the Intervenors' chief negotiator and advised that Holly Farms was being purchased by Tyson Foods, Inc. (hereinafter "Tyson") and suggested the negotiating sessions be postponed because he did not know whether he would be retained as the chief negotiator following the purchase by Tyson and did not know what position would be taken at the bargaining table following the purchase by Tyson.

The parties stipulated that on July 18 Tyson purchased all of the stock of Holly Farms and thereafter engaged in the same business operations at the same locations having the same product and substantially the same customers and had, as a majority of its employees, individuals who were previously employees of Holly Farms. However, the management employees who had previously supervised the drivers in the driver/yardmen unit immediately became Tyson supervisors, wearing Tyson uniforms and carrying out Tyson orders.

The negotiations resumed on August 8, 9 and 10 (A-602-608) and at that time, Hogg continued as chief negotiator for the employer. He advised the Intervenors that Holly Farms was now fully owned by Tyson and that Tyson had full control over the operation of Holly Farms, including labor relations. At those renewed negotiations, the individuals who had formerly been negotiating on behalf of Holly Farms had now become part of the Tyson management team and, in addition, individuals who were Tyson employees and who had not been present at the earlier negotiations, were now present and participating.

While the employees continued to receive their pay by way of Holly Farms checks, it was readily apparent to the employees in the driver/yardmen unit that they were being supervised and their destinies controlled by Tyson.

At the August 8 negotiating session, Hogg stated that the Company had decided to make certain changes which would affect certain employees in the driver/yardmen unit.

The Intervenors objected to, and sought a chance to bargain about, those unilateral changes. Hogg also announced that Tyson was withdrawing the 4% pay increase that Holly Farms had proposed in the June 22 negotiating session.

At the negotiating session on September 12, (A-618-628) Hogg opened the meeting by stating that he was not there to negotiate but to make an announcement. He said Tyson was going to integrate the drivers into Tyson's Transportation Division and that they would become Tyson employees and be paid under the Tyson pay scale. The Intervenors objected, asked questions and requested information from the Petitioners. The Petitioners told the Intervenors that they did not intend to integrate any other division of Holly Farms employees into Tyson. When the Intervenors asked what the Petitioners intended to do with respect to the yardmen in the driver/yardmen unit, Hogg stated they would do whatever was feasible in placing those employees.

On the day following the September 12 meeting, Petitioners met with the driver employees and told them of the proposed merger of the Transportation Division. During the course of one of those meetings, an employee asked about the status of the Union, and supervisor Howard Baird stated: "There is no more Union."

While the Petitioners continue to maintain that these changes were necessary because the Holly Farms driver/yardmen operation was operating with an annual loss of $5 to $6 million, that figure is simply incorrect. That loss figure comes from Respondents' Exhibit 14, which is a recalculation of the Holly Farms driver/yardmen unit operating expenses. The first column of that exhibit shows the total revenue to Holly Farms based upon a mileage rate of $1.28 per mile. There was no actual revenue to this unit since these were all intercompany transactions. However, using a figure of $1.28 per mile was reasonable because that was comparable to what Holly Farms was having to pay to

have outside carriers haul their product. One of the former Holly Farms supervisors, David Hayes, testified that by the summer of 1989, Holly Farms had reduced its cost per mile for the Company trucks to $1.20 to $1.21 per mile and that at this figure, he felt they were competitive with outside carriers. Mr. Hayes stated that any difference which the Company would have saved by using outside carriers was well worth paying in order to have the better service rendered by having Holly Farms' own employees deliver the product. Thus a comparison of that $1.28 per mile figure with the actual expense figure shows that Holly Farms was not losing money as claimed by the Petitioners. However, instead of using a revenue figure based upon what an outside carrier would charge or what the actual expenses were to Holly Farms, the Tyson officials changed the Holly Farms revenue figures to a per-mile charge of $1.005 per mile. This is shown in the third column of Respondents' Exhibit 14. Petitioners gave no explanation as to how they arrived

at that $1.005 per mile figure. However, by claiming revenue at the artificially low $1.005 per mile rate, and comparing that figure to actual expenses, Petitioners claimed that Holly Farms was suffering a $480,000 per month loss — some $5 to $6 million per year. Of course, had Petitioners used as a revenue rate the rates at which outside carriers would haul this freight — $1.30 to $1.40 per mile — then Holly Farms would show a profit rather than a loss.

The Petitioners also claimed that the integration was necessary because Holly Farms was driving a large number of empty (deadhead) miles and that this adversely affected their profitability. Again, Petitioners' own exhibits showed that the deadhead miles driven by Holly Farms were less than 21% of all miles driven and that Tyson's own deadhead miles averaged 10% and had been, in the late 1980's, as high as 12%. Thus Holly Farms' deadhead miles were only 9% to 10% greater than were Tyson Foods' deadhead miles. While there would be some savings if the Holly Farms

deadhead miles could be reduced to the Tyson levels, this would not result in anywhere near the large amount of savings Petitioners claimed would result from the transfer of drivers from Holly Farms to Tyson.

The Petitioners also claimed that following September 22, the driver/yardmen unit was fully merged and integrated into the Tyson operation. The Board disagreed and found that the driver/yardmen unit remained a separate appropriate unit. (A-127-131) That decision was affirmed by the Fourth Circuit. At the time of the ALJ's hearing, there was virtually no interaction between the former Holly Farms drivers and drivers who worked for Tyson prior to September 22. Since September 12, there have been no transfers between Tyson's divisions and the former Holly Farms unit and the former Holly Farms drivers virtually never even see any of the Tyson drivers on the road. The former Holly Farms drivers are under separate supervision from the remaining Tyson drivers and are paid on Holly

Farms checks; receive the same benefits as other Holly Farms drivers, benefits which were greater than those paid to Tyson drivers; former Holly Farms drivers were generally paid more than Tyson drivers; and all records for the former Holly Farms drivers are kept in Wilkesboro, whereas the records for other Tyson drivers were kept in Arkansas. Moreover, until at least January 1990, the trucks driven by these former Holly Farms drivers were operated under Holly Farms' ICC operating authority.

Many of the other changes which Petitioners claimed they made in the alleged integration were purely cosmetic and demonstrate that the former Holly Farms drivers still work in much the same way in the same separate unit as they did before the claimed "integration". Thus, for example, Petitioners claim that they changed the Holly Farms system to a fleet manager concept for dispatching drivers. However, testimony showed that the fleet managers are primarily responsible for the assignment of freight loads

to particular drivers, that the fleet managers are assigned to work at their respective terminals and report to an operations manager, and that below the fleet manager are two dispatch coordinators for every 50 to 60 trucks. Thus the fleet managers under the Tyson system are virtually identical to the dispatchers under the Holly Farms system, and those fleet managers not only do the same work as previously done by dispatchers, but were themselves previously dispatchers for Holly Farms. Likewise, other positions formerly at Holly Farms remained the same under Tyson, except for a change in title.

Other evidence also showed that the former Holly Farms drivers maintained a separate identity from the Tyson drivers. The Holly Farms drivers work out of a previously existing Holly Farms facility in Wilkesboro, North Carolina, though they are still allowed to park their vehicles at the terminals at which they worked and continue to have the first leg of their trip begin at the terminal near their home. The

former Holly Farms drivers continue to take their original loads from the same plants as they had prior to September 22, drive the same routes they had for Holly Farms, and ultimately return to those plants and park their vehicles just as they had done prior to September 22. The Tyson drivers do not keep their vehicles at those locations, do not begin their trips at those locations, and do not return to those locations. Based upon these facts, as well as others, the ALJ and the Board found that the Holly Farms driver/yardmen unit remained identifiable and separate from the remainder of the Tyson drivers and was an appropriate unit for negotiating purposes. (A-722-738, A-127-131)

Following the September 12 meeting, Intervenors sent several letters to Petitioners in an attempt to meet and bargain and to secure relevant information. The Petitioners took the position that the Intervenors were not entitled to the requested information, and Tyson refused to meet or negotiate with the Intervenors on any subject. Some 209

drivers were sent letters by the Petitioners offering them employment with Tyson under terms unilaterally set by Tyson. Some 47 drivers rejected these employment terms set forth in that letter (which included reductions in their rate of pay) and refused to accept the job offered in that letter. The remainder of the drivers signed the statement in the September 12 letter accepting employment, but shortly thereafter commenced a strike against the Petitioners because of the unfair labor practice of the Petitioners, including refusal to bargain with their union.

B. The Live-Haul Unit.

On February 16, one of the Intervenors, Chauffeurs, Teamsters and Helpers Local 391 (hereinafter "Local 391") filed a petition seeking to represent the live haul, feed haul, feed mill and service center employees at the Holly Farms facilities in Wilkesboro and Roaring River, North Carolina (hereinafter referred to as the "live-haul unit"). At the election in that unit, there were 95 ballots cast for the Union

and 95 ballots cast against the Union, with one challenged ballot, which the ALJ ultimately determined should not be counted.

As part of its production process, Holly Farms operates an egg hatchery at its Wilkesboro facility. Shortly after the chicks are hatched, Holly Farms transports them to the farms of independent contract farmers who receive payment to raise the chicks into full-grown broiler chickens. The contract farmer feeds the chicks with feed produced at Holly Farms' feed mill facility in Roaring River, North Carolina. At that facility, feed mill employees process grain into feed and feed haul drivers transport it to the contract farms. The Roaring River facility also employs mechanics who service the trucks that haul the feed.

After the contract farmers have raised the chicks to full-grown broiler chickens, Holly Farms sends "live-haul" crews from its Wilkesboro facility to the contract farms. A live-haul crew consists of a live-haul truck driver, a forklift

operator, and about nine "chicken catchers." At the contract farm, the chicken catchers manually catch and box the chickens, and the forklift operator places the boxes on the truck. The crew then delivers the chickens back to the processing plant at the Wilkesboro facility. On occasion, the live-haul crews also transport to the processing plant chickens that Holly Farms purchases from outside sources. At the processing plant, Holly Farms production employees slaughter the chickens and prepare them for market. The sole issue regarding this unit is whether certain of the employees within the unit are agricultural employees.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners bring forward four issues in their Petition. However, none of these issues warrant review by this Court. First, the issue of whether Tyson Foods became a successor to Holly Farms solely through its purchase of the stock of Holly Farms was not addressed by the Fourth

Circuit below. Instead, it and the Board made their determination based upon all the facts and found that Tyson Foods became obligated to deal with the unions representing Holly Farms employees following its purchase of the Holly Farms stock. That decision was clearly correct under this Court's earlier decisions and does not conflict with any decision of any other circuit court.

Similarly, the Fourth Circuit used the correct standard in holding that the Petitioners must bargain about any "effects" which are "not the inevitable consequence" of the Petitioners' decision to transfer drivers from Holly Farms to Tyson Foods. That standard meets the policies underlying this Court's decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) and is the same standard used by the only other circuit to have considered the issue.

The third issue raised by the Petitioners concerns whether the Board was correct in ordering reinstatement with back pay to some 47 employees unlawfully discharged. As

Congress gave the Board the exclusive power to determine remedial relief under the National Labor Relations Act (the "Act") and as § 10(c) of the Act specifically provides that the Board can grant reinstatement with back pay, this issue does not present, in any way, an issue which needs this Court's attention.

The last issue raised by the Petitioners similarly does not require this Court's review. That issue, regarding whether certain employees in the live-haul unit are agricultural workers and thus exempt from the Act, has been addressed and answered in Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977). The Fourth Circuit correctly deferred to the Board's decision as required by this Court in Bayside, and its decision does not conflict with any other circuit decision reviewing a Board decision on this issue.

I. THE NLRB AND THE FOURTH CIRCUIT CORRECTLY FOUND THAT TYSON FOODS BECAME A "SUCCESSOR" EMPLOYER.

A. Neither the Fourth Circuit Nor the NLRB Decision Raises the First Question Presented in the Petition.

The first question presented in the Petition (p. i) is: "Does a purchaser of the stock of an ongoing corporation, solely by virtue of its stock ownership interest, become a successor under NLRB v. Burns International Security Services, 406 U.S. 272 (1972), to the employing corporation's bargaining obligation with an existing union at the time of the stock purchase?" However, neither the Fourth Circuit nor the Board decided that narrow issue. Instead of focusing on whether a company can become a successor "solely by virtue of its stock ownership interest," both the Fourth Circuit and the Board followed this Court's directions to determine whether, under all of the facts and in light of prevailing labor law policies, the Petitioner Tyson Foods

became legally obligated to the employees of the Petitioner Holly Farms following its purchase of the stock of Holly Farms on July 18, 1989.

This Court has repeatedly stated that the obligations of a company to employees of another company arise under "a variety of circumstances involving a merger, stock acquisition, reorganization or assets purchase." NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 291 (1972). Whether such an obligation arises "requires analysis of the new employer and of the policies of the labor laws in light of the facts in each case." Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 262 n. 9 (1974).

While the Fourth Circuit correctly followed these directives in rendering its decision, the Petitioners focus only on Tyson's purchase of the Holly Farms stock and argue that with a stock purchase, Tyson could never become a "successor" at the time the stock is purchased. Petitioners'

view of who can become a "successor" is far too narrow and conflicts directly with this Court's mandate that the NLRB and the courts engage in a much broader inquiry.

Thus the narrow issue set out in Petitioners' first Question Presented was not resolved either by the Fourth Circuit or the NLRB. This case therefore is not appropriate for review.

B. The Fourth Circuit Decision Does Not Conflict With the Decisions of Other Circuits.

Petitioners are also incorrect when they claim that the Fourth Circuit "decision is inconsistent with the decisions of all other circuits that have considered the issue." (Petition for Writ of Certiorari, p. 25) Thus, since no conflict exists, this petition does not afford an opportunity to resolve a conflict among the circuits.

The decisions relied upon by the Petitioners from the Sixth, Seventh, Tenth and District of Columbia circuits do not stand for the proposition espoused by the Petitioners —

that is, none of those decisions hold that a company which purchases the stock of another company (rather than purchase its assets or merge with it) can never be found to have an obligation to deal with the union for the employees of the purchased company. The factual situations in those cases simply did not give rise to this narrow question. Instead, those decisions support, rather than conflict with, the decision rendered by the Fourth Circuit in this case.

Similarly, the Petitioners incorrectly assert that the Fourth Circuit decision in this case conflicts with the earlier Fourth Circuit decision in EPE, Inc. v. NLRB, 845 F.2d 483 (4th Cir. 1988). (See Petition at p. 40 n. 3) Under the Fourth Circuit rules, one panel of the Court cannot overrule a decision previously made by another panel. The Fourth Circuit obviously did not believe it was overruling EPE in this case — in fact, it cited EPE in support of several of its conclusions. While the Petitioners, in both their motion for reconsideration en banc and their motion to stay mandate,

claimed that the Fourth Circuit decision in this case conflicted with EPE, the Fourth Circuit denied both the request for rehearing en banc and the motion to stay mandate. It would not have done that had it believed that the decision in this case overruled EPE.

Similarly, in their motion for reconsideration and rehearing en banc and its motion to stay mandate, the Petitioners asserted to the Fourth Circuit that its decision conflicted with the decisions of other circuits. In its decision in this case the Fourth Circuit specifically did not find that its position conflicted with those of the other circuits. Instead, it took the position that its decision conformed to the tenets espoused in the other circuits. Just as the Fourth Circuit decision in this case did not conflict with its earlier opinion in EPE, the Fourth Circuit decision does not conflict with the opinions rendered by other circuits.

The Fourth Circuit and the Board both found that Tyson became a "successor" to Holly Farms as of July 18,

1989. They used the term "successor" in the sense of "the extent to which an employer is obligated to honor the legal relations established between another employer and a union." General Teamsters Union No. 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974). The issue of when an employer becomes obligated to honor legal relations previously existing between another employer and its employees and their bargaining representative arises in a multitude of contexts, and the Board and the courts have utilized a variety of formulae to resolve the issue. Underlying all of these formulae (single employer, joint employer, alter egos, successor employers, etc.) is a basic policy that attempts to promote "industrial peace underlying the National Labor Relations Act by forestalling the employee frustration that would result if employees find themselves in substantially the same job, but deprived of the representation of the union." EPE, Inc. v. NLRB, 845 F.2d 483, 489 (4th Cir. 1988). See also Fall River Dyeing and

Finishing Corp. v. NLRB, 482 U.S. 27, 39-40 (1987).

This Court and the Board have recognized that with the wide variety of corporate transformations possible, an employer should not be able to use a successor enterprise as a way a getting rid of a labor contract or union representation. While an employer is free to structure its business in a variety of ways, it cannot do so in such a way as to thwart union representation. Thus the Board and the Courts look to the employees' perceptions and "if the employees find themselves in essentially the same job after the employer transition and if their legitimate expectation and continued representation by their union is thwarted," Fall River Dyeing, supra at 43, the surviving (or, in other words, "successor") employer is bound to recognize and bargain with the employees' union. In some instances, the old employing enterprise will disappear or have no further relationship to the employee. In other cases, the old employing enterprise will continue to have some relationship

to the employees.

Following July 18, 1989, management employees who had previously supervised the drivers in the driver/ yardmen unit immediately became Tyson supervisors, wearing Tyson uniforms and carrying out Tyson orders. Tyson also took over control of the negotiations with the chosen collective bargaining representative. While the employees continued to receive their pay by way of Holly Farms checks, it was readily apparent to the employees in the driver/yardmen unit that they were being supervised and their destinies controlled by Tyson. The Board and the Fourth Circuit correctly recognized that from July 18 forward, Tyson controlled and directed the employees in the driver/yardmen unit, regardless of what corporate name they ascribed as the employees' employer, and that Tyson was therefore an employer with a duty to negotiate with the employees' chosen bargaining representative. That decision does not conflict with the decisions of this Court or the other

circuits.

The Petitioners' argument is also premised on a false factual claim — that is, that there were no substantial changes in the operation affecting the employees. What the Fourth Circuit and the Board found was that there was a substantial continuity between Holly Farms and Tyson. (See Fourth Circuit decision at A-25) But that does not mean that there was not a broader form of reorganization than a mere stock transfer. The Board, in particular, made extensive findings concerning Tyson's involvement in the operation of the driver/yardmen unit as of the time of its purchase of the stock on July 18, 1989. (See NLRB decision, A-110-114) It was this involvement of Tyson in the operation of the Holly Farms Transportation Division, along with the other facts in the case and the labor policies governing this area of the law, which the Board and the Fourth Circuit found warranted the application of successorship principles to Tyson.

C. The Decisions of the NLRB and the Fourth Circuit on This Issue Are Correct.

Whether a title was ascribed to Tyson (either as successor, joint or single employer or whatever), the critical determination was that Tyson had an obligation to bargain with the union representing the driver/yardmen employees. This determination by the Fourth Circuit is completely in concert with the decisions of this Court and the other circuits.

The Petitioners argue that where there is a stock transfer, successorship principles can never be applied. While it argues that this principle has been recognized by other circuit courts (and the Fourth Circuit in EPE), that claim is simply wrong. None of those courts have held that a company which purchases the stock of another can not be obligated to honor the legal relations established between that other employer and a union. When all the facts are considered and the legal policies which control are brought

into play, a company which has purchased the stock of another may have an obligation to bargain with the union that represents employees of that other corporation. This principle is found not only in the cases cited by the Petitioners, but also in a number of other decisions. Thus in NLRB v. Edjo, Inc., 631 F.2d 604 (9th Cir. 1980), enforcing 238 NLRB No. 207 (1978), Costa Trucking had a collective bargaining agreement with a union. The stock in Costa Trucking was purchased by Edjo, Inc. Costa Trucking continued to exist and was not merged into Edjo. The Board and the Ninth Circuit agreed that Edjo was a "successor" employer with a duty to bargain with the union before making unilateral changes in working conditions.

Similarly, in NLRB v. Winco Petroleum, 668 F.2d 973 (8th Cir. 1982), the Board and the Eighth Circuit found that a purchasing company was a "successor" corporation even though its purchase was made through a stock transfer. In that case, Cooper Oil bought all of the stock of Winco

and operated the business in the same way with the same employees and the same equipment at the same location from the date of the sale on March 6, 1979 until Winco was merged into Cooper Oil on April 2, 1979. Both the Board and the Eighth Circuit held that Cooper Oil became a successor on the date of sale.

Thus the Petitioners are incorrect when they claim that a "successorship" analysis is not appropriate in this case simply because there was a transfer of the stock in Holly Farms to Tyson. Both the Board and the Fourth Circuit took that factor into consideration but also looked at the other factors and how those factors affected the employees in the driver/yardmen unit. The Fourth Circuit properly found that the application of successorship principles was appropriate under all of those facts and in light of the labor policies governing these decisions. Because that decision is in accord with this Court's pronouncements in this area, this case does not present a case which is appropriate for this Court's

review.

II. THE NLRB AND THE FOURTH CIRCUIT PROPERLY REQUIRED THE PETITIONERS TO BARGAIN OVER THE EFFECTS OF THEIR DECISION TO TRANSFER THE DRIVERS TO TYSON FOODS.

The Petitioners seek to limit the effects about which they are required to bargain following their determination to transfer the drivers to Tyson Foods. While Petitioners admit they must bargain over effects, they claim that the "effects" over which they must bargain are limited and few. The Petitioners' argument is directly contrary to this Court's pronouncements and the decisions of the other circuit courts of appeals.

The Fourth Circuit required that the Petitioners negotiate about any "effects" which are "not the inevitable consequence of the underlying management decision." (A-33-34) This is the same standard used by the Ninth Circuit in NLRB v. Litton Fin. Printing Division, 893 F.2d 1128

(9th Cir. 1990), rev'd in part on other grounds, 501 U.S. 190 (1991). The decision of both the Fourth and Ninth Circuits is based directly on this Court's prior decisions and fully comports with those decisions.

Petitioners point to no conflict between the circuits, and while they claim the Fourth Circuit decision is inconsistent with this Court's opinion in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), they point to no specific language within that decision which requires a test different from that used by the Fourth Circuit here. Moreover, Petitioners do not propose any rule or standard to replace the one used by the Fourth and Ninth Circuits. This is not surprising given that it would be impossible to fashion such a rule which would remain faithful to this Court's opinion in First National Maintenance while achieving the limited result Petitioners desire.

The standard followed by the Fourth and Ninth Circuits arises out of and is consistent with this Court's

opinion in First National Maintenance and presents a rational and workable standard to use in determining the "effects" which are the subject of bargaining.

This case therefore does not present an appropriate vehicle to address a question which is not in conflict between the circuits and which complies with this Court's earlier directives.

Finally, Intervenors believe that Petitioners were obligated to bargain over the original decision to transfer the Holly Farms drivers to Tyson Foods (the "integration decision") based upon this Court's decision in First National Maintenance, supra. If that is correct, then Petitioners cannot limit the bargaining to the "effects," but must bargain over all possible issues. This is a further reason why Petitioners' argument must fail and why the Petition should therefore be denied.

III. REINSTATEMENT WITH BACK PAY WAS THE PROPER REMEDY FOR EMPLOYEES DISCHARGED IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT.

The NLRB found that in transferring the drivers from Holly Farms to Tyson, the Petitioners had unlawfully discharged some 47 employees and ordered Petitioners to reinstate those drivers with back pay. (A-178-179) Though the Petitioners do not now contest the finding that these employees were unlawfully discharged, they ask this Court to grant certiorari in order to determine if the Board could grant such a remedy. On that issue there is no doubt but that the Board has that authority, and the Petition should therefore be denied.

Congress has given the Board the exclusive power to grant remedial relief. NLRB v. Food Store Employees Local 347, 417 U.S. 1, 8 (1974). If the Board determines that an unfair labor practice has occurred, § 10(c) of the Act, 29 U.S.C. § 160(c), requires the Board, among other

things, "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." Therefore, the Board's remedy will not be sustained only if it is in excess of the Board's authority. Virginia Elec. & P. Co. v. NLRB, 319 U.S. 533, 540 (1943). Here, the Board's remedy was specifically that granted to it by Congress — reinstatement with back pay. Petitioners cite no circuit court decision holding otherwise, and the Fourth Circuit felt the issue was so settled, it did not even mention it in the decision. Thus this issue is not one which requires this Court's attention, and the Petition should be denied.

IV. THE NLRB PROPERLY EXERCISED ITS EXPERTISE IN DETERMINING THAT LIVE-HAUL DRIVERS, FORKLIFT DRIVERS AND CHICKEN CATCHERS ARE NOT AGRICULTURAL EMPLOYEES.

A. The Fourth Circuit Correctly Deferred to the NLRB's Decision on This Issue.

The Petitioners seek to avoid bargaining with Local 391 concerning the "live-haul" unit by claiming that among those employees are agricultural workers.[2] The NLRB found that under the facts in this case the employees in question were not agricultural workers. This decision was consistent with its rulings in other cases raising this issue.

It is the NLRB's special duty to apply the Act's exemption for agricultural laborers "to varying fact patterns." Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 304 (1977). In performing that duty, the NLRB must construe the provisions of the Act liberally in favor of the workers for whose protection those laws were designed and "narrowly construe" any exemption from the terms of those laws. Wirtz v. Ti Ti Peat Humus Company, Inc., 373 F.2d

[2]The Petitioners do not now contest that they committed numerous unfair labor practices in this unit or that a bargaining order is appropriate under these circumstances. Instead, they attempt to avoid the effect of these rulings by claiming that the unit is inappropriate because it contains agricultural employees.

209, 212 (4th Cir.) cert. denied, 389 U.S. 834 (1967). The Board's construction of the agricultural laborer exemption is entitled to deference on review because it presents a question that is "particularly unsuitable" for a reviewing court. NLRB v. Cal-Main Farms, Inc., 998 F.2d 1336, 1339 (5th Cir. 1993). Accord, Bayside Enterprises, 429 U.S. at 304 n. 14. The Fourth Circuit gave proper deference to the NLRB's decision, which it found was consistent with those the Board had made in similar cases. (A-49) Thus this case is not one that needs further appellate review.

B. There Is No Conflict Between the Circuits On This Issue.

The Fourth Circuit also recognized that the other federal appellate decisions which were squarely on point had found that employees engaged in the type of tasks involved in this case were not agricultural laborers. (A-50-51) NLRB v. Hudson Farms, Inc., 681 F.2d 1105, 1106 (8th Cir. 1982) cert. denied, 459 U.S. 1069 (1982); Valmac Industries

v. NLRB, 599 F.2d 246, 247, 249 (8th Cir. 1979). While the Fourth Circuit refused to follow the decision in Coleman v. Sanderson Farms, Inc., 629 F.2d 1077 (5th Cir. 1980) — the case relied upon by the Petitioners to claim a split in the circuits[3] — it did so because of a fundamental difference in the cases. As the Fifth Circuit itself recognized in Coleman, that case arose under the FLSA and not the NLRA. Accordingly, it had not been subject to overview by the NLRB and was not subject to the policy of judicial deference to NLRB determinations. The Fourth Circuit found this fact crucial when it determined that Coleman was not binding because it "fails to give proper weight to the judgment of the

[3]The Petitioners also cite NLRB v. Victor Ryekebosch, Inc., 471 F.2d 20 (9th Cir. 1972) as a conflicting decision. However, that case was cited by this Court in Bayside as a case in conflict with the circuit court opinion in Bayside. 429 U.S. at 299 n. 4. Thus by affirming the Board's decision in Bayside, this Court found that the Ninth Circuit's decision in Ryekebosch was wrong. That decision thus cannot be considered as a viable conflict with the Fourth Circuit decision in this case.

Board," citing this Court's opinion in Bayside Enterprises, 429 U.S. at 304. (A-52) Therefore, the Petitioners are incorrect when they claim that the Fourth Circuit's decision in this case conflicts with the decision in Coleman.

As there is no real conflict between the circuits, as the Board's decisions in this area are completely consistent, and as the Board's determinations are entitled to great deference from reviewing courts, this issue has been properly determined by the Fourth Circuit and does not require review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner Tyson Foods, Inc., became a successor to petitioner Holly Farms Corporation on the date upon which Tyson bought all of the stock of Holly Farms.

2. Whether the Board reasonably concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5), by refusing to bargain with the union about the terms and conditions of employment of Holly Farms' drivers, as an effect of petitioners' decision to integrate Holly Farms' transportation operation into Tyson's transportation system.

3. Whether the Board properly ordered petitioners to reinstate with backpay 47 Holly Farms drivers who were unlawfully discharged for declining employment under terms and conditions unilaterally imposed by petitioners.

4. Whether the Board reasonably found that petitioners' "live haul" employees were not "agricultural laborer[s]," which are excluded from the Act's coverage under Section 2(3) of the Act, 29 U.S.C. 152(3).

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A78) is reported at 48 F.3d 1360. The decision and order of the National Labor Relations Board (Pet. App. A79-A205) and the decision of the administrative law judge (Pet. App. A206-A935) are reported at 311 N.L.R.B. 273. The Board's decision in the representation proceeding (App., *infra*, 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1995. A petition for rehearing was denied on May 9, 1995. Pet. App. A936-A938. The petition for a writ of certiorari was filed on August 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In October 1988, petitioner Holly Farms Corp. (Holly Farms) was engaged in the production, processing, and transportation of poultry. Pet. App. A5. At that time, petitioner Tyson Foods, Inc. (Tyson), a firm engaged in similar operations, offered to buy the stock of Holly Farms. *Id.* at A4-A5. In anticipation that its offer would be accepted, Tyson officials drafted a plan, dated January 24, 1989, to merge the two companies' transportation divisions. *Id.* at A600.

In December 1988, an organizing campaign was begun by respondent Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 592, 567, and 988, all affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union), among a unit of drivers and yardmen at Holly Farms' plants in North Carolina, Virginia, and Texas. Pet. App. A6, A81 n.8, A210-A211, A232.[1] In March 1989, the Union

[1] The Union also began organizing campaigns among units of production employees and "live haul" employees at Holly Farms. "Live haul" employees were responsible for catching, caging, and transporting petitioners' chickens from the farms of independent contract growers to petitioners' processing plant in Wilkesboro, North Carolina. See Pet. App. A40-A41, A787-A788 n.268; see also n.4, *infra*. The National Labor Relations Board found that, in connection with those campaigns, petitioners committed numerous violations of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by, *inter alia*, discharging employees for engaging in union activity. Pet. App. A157-A163. The court of appeals upheld those findings (*id.* at A8), and petitioners do not challenge them here.

was elected and certified as the collective-bargaining representative for the drivers-yardmen unit. *Id.* at A11, A233. In April 1989, the Union and Holly Farms began negotiating a labor agreement for that unit. *Id.* at A11, A597. The negotiations were suspended in July 1989, however, when Holly Farms decided to accept Tyson's bid. *Id.* at A598 & n.195.

On July 18, 1989, Tyson acquired 100% of the stock of Holly Farms, making it a wholly owned subsidiary of Tyson. Pet. App. A11, A61, A715. In a meeting with the Union in August 1989, Tyson announced that it had taken "full control" of Holly Farms' operations and that it planned to integrate Holly Farms' western transportation division into Tyson's transportation department. *Id.* at A95-A96, A602-A603, A607 n.199. In September 1989, however, Tyson decided instead to integrate Holly Farms' entire transportation system, both its western and eastern divisions, into Tyson's transportation system. *Id.* at A617; see also *id.* at A96, A97 n.16, A615-A616, A773, A775-A776.

Tyson announced its full-integration decision in a meeting with the Union on September 12, 1989. Pet. App. A620. At that meeting, Tyson also expressed its view that, after integration, Holly Farms' transportation divisions would cease to exist, and that the Union would not have majority support among the combined group of transportation employees. *Id.* at A98, A626. Immediately after the meeting, Tyson wrote all 209 of Holly Farms' drivers, offering to hire

them, on different terms, as employees of Tyson. Forty-seven drivers failed to accept the offer by September 22, 1989, and were thereby deemed to have quit. *Id.* at A12-A13, A739.

Petitioners refused the Union's later written requests to bargain over (1) a labor agreement for the Holly Farms drivers-yardmen unit; (2) the decision to integrate the Holly Farms transportation system into that of Tyson; and (3) the effects of that decision upon the Holly Farms drivers and yardmen. On September 22, 1989, petitioners withdrew recognition from the Union. Pet. App. A100-A101, A637, A638-A639, A640-A642, A643-A646, A651-A653. On October 1, 1989, the Union called a strike against petitioners on behalf of the Holly Farms drivers and yardmen. *Id.* at A241, A779-A780.

b. In late December 1988, Union Local 391 launched an organizing campaign in a unit consisting of Holly Farms' "live haul" employees. Pet. App. A211 n.49, A233. In a representation proceeding, the Board found that two groups of "live haul" employees together constituted an appropriate bargaining unit: (1) truck drivers, forklift operators, and "chicken catchers" at petitioners' plant in Wilkesboro, North Carolina; and (2) feed haul, feed mill, and service center employees at petitioners' plant in Roaring River, North Carolina. *Id.* at A211-A212, A233-A235. The Board rejected Holly Farms' contention that the live haul employees were "agricultural laborer[s]," which are excluded from the Act's coverage. App., *infra*, 1a-6a; see also 29 U.S.C. 152(3) ("The term 'employee' * * * shall not include any individual employed as an agricultural laborer."). On July 27, 1989, the Board held an election among the live haul

unit, resulting in a tie vote with one challenged ballot. Pet. App. A235.

2. The Union filed unfair labor practice charges against Tyson and Holly Farms. The Board's General Counsel issued consolidated complaints alleging that Tyson became Holly Farms' successor on July 18, 1989, when it acquired the stock of Holly Farms, and that Tyson thereafter violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), by refusing to bargain with, and withdrawing recognition from, the Union. Pet. App. A208 n.48, A209-A210.

a. After a hearing, the administrative law judge (ALJ) determined that, as of July 18, 1989, Tyson became the legal successor to Holly Farms and, as such, became obligated to bargain with the Union concerning a labor agreement for the drivers-yardmen unit. Pet. App. A716, A875. The ALJ found the requisite continuity of operations to hold that Tyson was a successor employer because, for about two months after the July 1989 acquisition, there were no significant changes in operations "from the standpoint of [the drivers-yardmen] unit employees" that would have "affect[ed] their desire for continued representation by the Unions." *Id.* at A716; see also *id.* at A713-A715. On the other hand, the ALJ rejected petitioners' contention that only a stock transfer, without any significant internal changes, took place during that period. The ALJ found, instead, that, "upon Tyson's assumption of control, key Holly Farms executives almost immediately were absorbed into the Tyson organization" and were required to act "in accordance with Tyson's dictates," including "what to tell the Unions" about the "major [proposed]

changes affecting the drivers-yardmen unit." *Id.* at A717-A718.

The ALJ observed that, although Tyson was obligated to bargain with the Union as of July 18, 1989, Tyson was "free to set initial terms" for the drivers-yardmen unit. Pet. App. A719 (quoting *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 40 (1987), quoting *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 294 (1972)). Because Tyson failed to change the existing terms and conditions of employment of that unit for two months, however, those terms "became * * * not subject to unilateral changes." Pet. App. A721. The ALJ rejected petitioners' contention that the unit ceased to exist when Tyson's full-integration decision took effect on September 22, 1989. The ALJ found that Holly Farms' transportation divisions retained separate identities after the integration. *Id.* at A735.

Accordingly, the ALJ concluded that petitioners violated Section 8(a)(5) of the Act by, *inter alia*, unilaterally announcing the full-integration decision to the Union and dealing directly with the drivers-yardmen unit employees on September 12, 1989 (Pet. App. A748, A885); unilaterally changing the terms and conditions of employment of unit employees on September 22, 1989 (*id.* at A756-A757); and withdrawing recognition from the Union (*id.* at A756). In addition, the ALJ found that the 47 Holly Farms drivers who declined employment under Tyson's unilaterally imposed terms had been constructively discharged, and that the work stoppage called by the Union on October 1, 1989, was an unfair labor practice strike. *Id.* at A888-A889.

As a remedy, the ALJ ordered petitioners to recognize and bargain with the Union concerning the drivers-yardmen unit; to rescind the unilateral changes to the unit employees' terms and conditions of employment, retroactive to September 22, 1989; to make the unit employees whole for any losses sustained as a result of the unlawful unilateral changes; to reinstate and make whole the 47 constructively discharged drivers; and, upon receipt of an unconditional offer to return to work, to reinstate to his or her former position any employee who participated in the October 1, 1989, strike. Pet. App. A914-A915, A918-A919, A921.

b. The ALJ sustained the challenge to the determinative ballot cast in the July 27, 1989, election in the live haul unit; that election thus ended in a tie. Pet. App. A818-A819, A856-A857. Finding that petitioners' unfair labor practices precluded the holding of a fair rerun election, the ALJ ordered petitioners to recognize and bargain with the Union as the representative of the live haul employees, pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. A794, A817, A919. Relying on the Board's determination in the representation proceeding, the ALJ rejected petitioners' contention that the live haul employees were "agricultural laborer[s]" excluded from the Act's coverage. *Id.* at A786-A787; see p. 4, *supra*.

3. In all relevant respects, the Board affirmed the ALJ's decision and adopted his remedial order. Pet. App. A79-A205. The Board found that "Tyson became a successor of Holly Farms when it purchased a controlling interest in the corporation on July 18, [1989]." Pet. App. A110-A111. The Board observed

that "Tyson's purchase of Holly Farms stock involved at the outset a broader form of reorganization than a mere stock transfer." *Id.* at A111. The Board also found that Tyson lost its right to set the initial terms on which it would hire Holly Farms' drivers when it failed to change the existing terms of their employment for two months after it became a successor; Tyson therefore "could not unilaterally change those terms on September 12, [1989]," when it offered to hire the drivers on different terms. *Id.* at A114.

The Board further found that petitioners violated Section 8(a)(5) of the Act by refusing to bargain with the Union "about the September 12 offer of employment to the Holly Farms unit employees as an effect of the integration decision." Pet. App. A124-A125.[2] The Board explained that "employers may be obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain." *Id.* at A121. That principle applied here, the Board found, because "the terms at which the Holly Farms drivers were offered employment were not an inevitable consequence of the functional integration of the transportation departments, but were only one of a number of

[2] The Board reversed the ALJ's finding that petitioners violated Section 8(a)(5) by refusing to bargain with the Union about the integration decision itself. Pet. App. A120-A121. Relying on *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), the Board concluded that the decision to integrate was not a mandatory subject of bargaining. Pet. App. A116-A121. That ruling is not at issue in this Court.

responses to changed circumstances." *Id.* at A122 (internal quotation marks omitted).[3]

The Board concluded that a *Gissel* bargaining order covering the live haul unit was appropriate. Pet. App. A156. In rejecting petitioners' challenge to the *Gissel* order, the Board relied on its prior determination in the representation proceeding that the live haul workers were not "agricultural laborer[s]" within the meaning of the Act. *Id.* at A83 n.8.

4. The court of appeals enforced the Board's order. Pet. App. A1-A53.

The court held, first, that "substantial evidence and the policies of the labor laws support the Board's finding here that Tyson came under a duty to bargain with the Union when it purchased Holly Farms." Pet. App. A21. The court explained that "[t]he policy underlying the National Labor Relations Act is to promote industrial peace," and that "[t]he successorship doctrine * * * seeks to promote this policy by forestalling the employee frustration that could result if employees found themselves in substantially the same job, but deprived of the representation of their union." *Id.* at A21-A22 (citations and internal quotation marks omitted). The court observed that, for two months after purchasing Holly Farms, Tyson made no changes in operations

[3] The Board further found that petitioners unlawfully discharged the 47 drivers who declined Tyson's September 12, 1989, job offers. Pet. App. A125. The Board rejected petitioners' contention that they were free to withdraw recognition from the Union because the Holly Farms drivers-yardmen unit ceased to exist after integration. *Id.* at A127-A131. The Board accordingly concluded that the strike called on October 1, 1989, was an unfair labor practice strike. *Id.* at A167.

that would have caused Holly Farms' employees to believe that their job situations had essentially altered (*id.* at A25); those employees therefore "could reasonably be expected to continue their support for the Union" (*id.* at A26).

The court held, next, that substantial evidence supported the Board's finding that Tyson violated Section 8(a)(5) of the Act by unilaterally changing the terms and conditions of employment of the members of the drivers-yardmen unit in September 1989. Pet. App. A28. The court observed that, even if an employer need not bargain over an "'economically-motivated' management decision[]," it must bargain over "effects" that "are not the inevitable consequence of the underlying management decision itself." *Id.* at A32-A34 (internal quotation marks and emphasis omitted). The court found that "it was not inevitable for the Company to impose Tyson's pay plan and working conditions upon Holly Farms' drivers" (*id.* at A34); instead, "there was room for bargaining," as shown by, *inter alia*, Tyson's efforts "to accommodate the drivers' individual preferences as to the duration and mileage of their hauls" (*id.* at A35).

Finally, the court upheld the Board's determination that the employees in the live haul unit were not "agricultural laborer[s]" excluded from the Act's protection under Section 2(3) of the Act. Pet. App. A52. On appeal, petitioners challenged the Board's determination only with respect to the truck drivers, forklift operators, and chicken catchers at the

Wilkesboro plant. *Id.* at A39.[4] Relying on *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977), the court explained that, under the Act, "agriculture is defined in both a primary and a secondary sense": "[t]he primary meaning encompasses farming in all its branches, including the raising of poultry," while "the secondary meaning includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental[] to or in conjunction with primary farming operations." Pet. App. A44-A45 (internal quotation marks omitted). The court observed that petitioners conceded that the Wilkesboro workers were not engaged in "primary" farming activities. *Id.* at A46. The court upheld the Board's determination that they also were not engaged in "secondary" farming activities. *Id.* at A52. The court reasoned that the live haul workers' activities occurred after "the Company has turned the broiler chicks over to independent contract growers and the Company's status as a farmer engaged in raising poultry (a primary agricultural activity) has ended." *Id.* at A48. The court held that those activities thus were not incidental to any

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[4] The court described the duties of those employees as follows (Pet. App. A40-A41 (footnote omitted)):

> A crew consists of a live-haul truck driver, a forklift operator, and about nine "chicken catchers." The live-haul driver drives a flat-bed truck, which carries the entire crew to the farms of the independent contract growers who raise the broiler chickens. Under cover of darkness, the chicken catchers manually catch and cage the chickens, the forklift operator places the steel cages on the flat-bed truck, and the truck delivers the chickens to a storage area * * *.

primary farming operations on the part of petitioners. *Id.* at A48-A49.[5]

Judge Niemeyer dissented from the holdings that Tyson became a successor employee upon the acquisition of Holly Farms' stock and that the live haul employer at the Wilkesboro plant were not exempt from the Act as "agricultural laborer[s]." Pet. App. A54-A55.[6]

ARGUMENT

1. The first issue in this case is whether, as of July 18, 1989, the relationship between Tyson and Holly Farms was that of a "successor employer" to a "predecessor employer," or, rather, that of a "new stockowner" to a "continuing employer." The Board found that, on the facts of this case, the relationship between Tyson and Holly Farms was a successorship. Pet. App. A110-A114. The court of appeals correctly held that the Board's finding was supported by substantial evidence. *Id.* at A13-A27.

a. Under the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, a new employer is a "successor" to a predecessor employer if there is "substantial continuity" between the business enterprise and workforce of the two employers. *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280-

[5] The court of appeals rejected petitioners' other arguments concerning the entry of a *Gissel* order covering the live haul unit. See Pet. App. A37 n.2, A52. Petitioners do not renew those arguments in this Court. Instead, they challenge only the determination that the live haul employees covered by the *Gissel* order are statutory employees. See Pet. 57.

[6] Judge Niemeyer did not, however, dissent from the subsequent denial of petitioners' petition for rehearing and suggestion of rehearing en banc. Pet. App. A936-A938.

281 & n.4 (1972); see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 43 (1987) (*Burns* "approved" the "substantial continuity" approach of the Board). A "successor" employer is not bound by the substantive terms of the predecessor's collective bargaining agreement, but it is obligated to bargain with the union representing the predecessor's workforce. *Burns*, 406 U.S. at 281-282. By contrast, a stock transfer "involves no break or hiatus between two legal entities, but is, rather, the continuing existence of a legal entity, albeit under new ownership." *Hendricks-Miller Typographic Co.*, 240 N.L.R.B. 1082, 1083 n.4 (1979). A "continuing employer" must continue to honor a preexisting collective bargaining agreement, notwithstanding the transfer of its stock. See *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 751 & n.20 (7th Cir. 1989); *EPE, Inc.* v. *NLRB*, 845 F.2d 483, 487 (4th Cir. 1988).

The determination whether a given case involves a successorship or a mere stock transfer is highly factbound. Cf. *Burns*, 406 U.S. at 274 ("Resolution [of a successorship issue] turns to a great extent on the precise facts involved here.") As the Board has explained, the relevant inquiry is whether the record demonstrates "more than the mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise." *Spencer Foods, Inc.*, 268 N.L.R.B. 1483, 1484-1485 n.5 (1984), affirmed in relevant part *sub nom. United Food & Commercial Workers, Local 152* v. *NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985). For where "a stock sale * * * serve[s] as a vehicle for acquisition of resources that will be used to operate a substantially different enterprise from that conducted by

the original owners, * * * the corporation might not be fairly termed a 'continuing' employer in any practical sense." *EPE*, 845 F.2d at 490.

Applying those principles, the Board reasonably found that, as of July 18, 1989, Tyson was a successor employer to Holly Farms. The Board observed that "Tyson's purchase of Holly Farms stock involved at the outset a broader form of reorganization than a mere stock transfer." Pet. App. A111. The Board explained that, "as early as January 1989, Tyson officials began formulating tentative plans for integrating the Holly Farms and Tyson transportation divisions." *Id.* at A111-A112. In addition, the Board found that, "at the time of the July 18 stock purchase, Tyson began to implement steps that would result in its substitution as the employing entity of the unit employees." *Id.* at A111. The Board found, in particular, that, "upon Tyson's assumption of control, key Holly Farms executives almost immediately were absorbed into the Tyson organization, and performed their duties as part of the Tyson management team and in accordance with Tyson's dictates." *Id.* at A112 (internal quotation marks omitted). The Board further found that Tyson's assumption of control affected negotiations with the Union over the labor agreement for the drivers-yardmen unit. *Id.* at A112-A113.[7] Those findings amply supported the Board's

[7] The Board found: "at the time of the stock purchase, negotiations between the Union[] and Holly Farms were suspended to enable * * * Holly Farms to clarify its status and bargaining position"; "to that end, on July 14 and 15, [1989,] management representatives from Holly Farms and Tyson met to discuss the status of the collective-bargaining negotiations, and also Tyson's corporate goals, which became the basis for the subsequent integration plans"; Holly Farms President Lovette "consulted with Tyson officials before instructing [petitioners'] attorney, Hogg, on how to present information about integration to the Union[]"; and, "when collective-bargaining negotiations resumed on August 8, [1989,] Tyson officials were present to answer questions about the operational changes that Tyson planned to implement." Pet. App. A112-A113 (internal quotation marks omitted). Indeed, as the ALJ noted, when negotiations resumed on August 8, 1989, petitioners' spokesman told the Union that Tyson "had taken full control over the Holly Farms operations" and was going to partially integrate Holly Farms' transportation operation into its own (*id.* at A602-A603); over the next several weeks, Tyson reconsidered that decision and decided instead to fully integrate Holly Farms' transportation operation. *Id.* at A617.

conclusion that "Tyson's involvement in the operation of the Holly Farms transportation division as of the time of its acquisition warrants the application of successorship principles as of that date." *Id.* at A113-A114.

b. Petitioners' challenge to the Board's finding of a successorship does not raise any issue warranting further review.

Petitioners contend (Pet. 39-40) that "a mere stock transfer, absent some accompanying substantial change in operations affecting the employees, does not make the new stockowner a successor to the existing employer's labor obligations." That contention, even if correct, is inapposite here.[8] The

[8] The decisions cited by petitioners (Pet. 33-40) in support of their contention do not conflict with the Board's finding of a successorship in this case. In *NLRB* v. *Miller Trucking Service, Inc.*, 445 F.2d 927 (10th Cir. 1971), cited at Pet. 34, the court found on the facts presented that no successorship had occurred, because "[t]he transfer of the corporate stock from [the seller] to [the purchaser] did not change the corporate

Board did not base its conclusion of successorship on the existence of "a mere stock transfer." Rather, the Board relied on its determination that "Tyson's purchase of Holly Farms stock involved * * * a broader form of reorganization than a mere stock transfer." Pet. App. A111. Furthermore, the Board cited evidence that that was true both "at the outset" of Tyson's plan to acquire Holly Farms, *ibid.*, and in the wake of the acquisition, *id.* at A111-A113. See also pp. 5-6, 14, *supra* (summarizing evidence).

Petitioners nonetheless assert (Pet. 40) that, "for 2 months following the purchase, nothing changed for the former Holly Farms employees." That assertion

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entity." 445 F.2d at 930. In *Esmark, Inc.* v. *NLRB*, 887 F.2d 739 (7th Cir. 1989), cited at Pet. 38-39, the court held that, because "[t]he successorship doctrine is limited to situations in which the predecessor and successor are unrelated entities," 887 F.2d at 750, a company could not claim that it had become a "successor to itself" merely because of a public offering of a portion of the stock of its corporate parent. *Id.* at 749-750. While, in that context, the court stated that "[t]he successorship doctrine is simply inapplicable to a stock sale transaction" (*id.* at 751), the court affirmed that, as in this case, "[w]here the parent specifically directs the actions of its subsidiary, using its ownership interest to command rather than cajole, the possibility of its violating the federal labor laws is present." *Id.* at 757. The other cases cited by petitioners are also consistent with the Board's successorship finding in this case. See *United Food & Commercial Workers* v. *NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985) (agreeing with the Board that successorship principles were applicable because "the events at issue here plainly involved a broader form of business reorganization, and not a mere stock transfer"), cited at Pet. 36-38; *Miami Foundry Corp.* v. *NLRB*, 682 F.2d 587, 588-589 (6th Cir. 1982) (where stock purchaser became a "single employer" with acquired firm, stock purchaser was obligated to recognize the union and honor the labor agreement), cited at Pet. 35-36.

obscures the difference between operational changes perceptible to the employees and internal changes that, though not perceptible to the employees, were nonetheless of significance for their job situation. As the ALJ found, for two months after the acquisition, "there had been no significant occurrence *from the standpoint of unit employees.*" Pet. App. A716 (emphasis added). The court of appeals similarly observed that "the employees [c]ould understandably [have] view[ed] their job situation as essentially unaltered." *Id.* at A25-A26. As the court explained, the employees' perception of no essential change "establish[ed] [the] substantial continuity between Holly Farms and Tyson" upon which a finding of successorship may be premised. *Id.* at A25; cf. *Burns*, 406 U.S. at 280 n.4. But the fact that the employees would not have perceived any changes in their job situation did not mean that no significant changes actually occurred. On the contrary, both the ALJ and the Board found that such changes did occur, as Tyson asserted dominion over Holly Farms' executives and made plans to integrate Holly Farms' transportation system into that of Tyson. *Id.* at A111-A114, A717-A719. Those changes supported the Board's conclusion that, upon acquiring Holly Farms' stock, Tyson replaced Holly Farms as the employing entity.[9]

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[9] Because the Board correctly found that Tyson became a successor employer in July 1989, it properly determined that Tyson was not entitled unilaterally to change the terms and conditions of employment of Holly Farms' drivers in September 1989. See *NLRB* v. *Dent*, 534 F.2d 844, 846 n.2 (9th Cir. 1976); see also *Burns*, 406 U.S. at 294-295. Petitioners' challenge to the latter determination (Pet. 42-43) is based

2. Petitioners contend (Pet. 44-51) that the court of appeals erred in holding that Tyson was obligated to bargain with the Union over the terms and conditions of employment of Holly Farms' drivers upon their integration into Tyson's transportation system. Petitioners also contend that the court of appeals' holding conflicts with *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). Those contentions are without merit.

In *First National Maintenance*, this Court considered the bargaining obligations of an employer that decided to close part of its business. 452 U.S. at 667. The Court held that, when such a decision has "as its focus only the economic profitability" of the business, it is a mandatory subject of bargaining "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden on the conduct of the business." *Id.* at 677, 679. At the same time, the Court reaffirmed the well-settled rule that the employer is obligated to bargain with the union regarding "the results or effects" on

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primarily on their erroneous contention that Tyson did not become a successor until that change occurred in September 1989—a contention contradicted by the Board's factual findings. Petitioners also contend (Pet. 43) that Tyson was free to withdraw recognition from the Union in September 1989 because "[t]he Holly employees were integrated into the much larger Tyson unit and lost any separate identity." See also Pet. ii (Question 2(b)). That contention, too, reflects merely a disagreement with the Board's specific finding that "the [Holly Farms] bargaining unit did not lose its separate identity" upon integration into Tyson's transportation system. Pet. App. A127. Such factbound disputes raise no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

employees of such non-bargainable decisions. *Id.* at 677 n.15; see also *id.* at 681 ("the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by [Section] 8(a)(5)").

Consistent with those principles, the Board reasonably concluded that, while Tyson's decision to integrate Holly Farms' transportation operation into its own was not a mandatory subject of bargaining (Pet. App. A120), petitioners were obligated to bargain about "the various ways in which the integration might affect the employment status and wages and benefits of the former Holly Farms drivers" (*id.* at A122). Matters such as pay, work locations, and schedules were proper subjects for "effects" bargaining with the Union, the Board explained, because they "were not an inevitable consequence of the functional integration of the transportation departments, but were only one of a number of responses to changed circumstances." *Ibid.* (internal quotation marks omitted); see also *id.* at A131 n.29. The court of appeals agreed, finding that, although Tyson's integration decision was "non-bargainable" (*id.* at A36), "there was room for bargaining over the drivers' working conditions, had Tyson been willing to bargain." *Id.* at A35. That case-specific finding does not warrant further review.[10]

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[10] Petitioners argue that effects bargaining cannot include "bargaining over the terms and conditions of employment that apply *after* an employee accepts a transfer elsewhere." Pet. 51. Petitioners do not cite any authority to support that argument. Such a restriction on the scope of effects bargaining would allow an employer unilaterally to alter employees' terms

3. Petitioners contend (Pet. 52) that the Board lacked authority to award reinstatement and backpay to the 47 Holly Farms drivers who were illegally discharged because they refused to accept Tyson's unilateral terms and conditions of employment. According to petitioners, the drivers had only two options: (1) to accept employment under the unlawfully imposed terms and conditions while pursuing unfair labor practice charges; or (2) to go on strike. Pet. 53-54. Contrary to petitioners' view, the drivers had a third option—to refuse to work under what they regarded as unlawful terms and conditions of employment, and to file unfair labor practice charges with the Board. Choosing that option did not require them to forgo a Board remedy for the unlawful activity. See *Tuskegee Area Transportation System*, 308 N.L.R.B. 251, 252-253 (1992), enforced mem., 5 F.3d 1499 (11th Cir. 1993), cert. denied, 114 S. Ct. 1834 (1994).

Nor was it "illogical" (Pet. 56) for the Board to order the 47 drivers to be reinstated immediately and paid backpay retroactive to the date of their discharge (Pet. App. A178-A180), while conditioning the reinstatement and backpay of the strikers upon their making an unconditional offer to return to work (*id.* at 184). The Board has reasonably determined that a dischargee's situation typically differs from that of an unfair labor practice striker.[11] A dischargee may be reluctant to apply for reinstatement, and such an

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and conditions of employment simply by changing their job location.

[11] See *S&F Enterprises, Inc.*, 312 N.L.R.B. 770, 770 & n.4 (1993); *Drug Package Co.*, N.L.R.B. 108, 113-114 (1977), modified on other grounds, 570 F.2d 1340 (8th Cir. 1978).

application may well be futile, since the employer has made clear (by the discharge) that the employee's services are not wanted. Unfair labor practice strikers, on the other hand, leave their jobs voluntarily. Moreover, an employer may need more time to reinstate unfair labor practice strikers because of the need to discharge replacement workers. Because the Board's views as to the appropriate remedy "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994), the court of appeals correctly enforced the Board's order.[12]

4. Finally, petitioners and their amicus contend that petitioners' live haul workers are "agricultural laborer[s]" excluded from the Act's coverage under Section 2(3) of the Act. Pet. 57-63; National Broiler Council Amicus Br. (NBC Br.) 10-11. They also contend that the court of appeals' decision upholding the Board's contrary conclusion conflicts with decisions in other circuits. Pet. 60-61; NBC Br. 6-8. There is no merit to either contention.

a. Section 2(3) of the NLRA defines "employee" for purposes of the Act to exclude an "agricultural laborer." 29 U.S.C. 152(3). The meaning of "agricultural laborer" for purposes of Section 2(3) is governed by Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(f). *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977) ("Annually since

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[12] Contrary to petitioners' suggestion (Pet. 56), the Board's remedy for the 47 dischargees is not inconsistent with the principle of "work now, grieve later." The dischargees could not have filed grievances over petitioners' unilateral decision to change their terms and conditions of employment, since there was no labor contract in place at the time between petitioners and the Union.

1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of 'agricultural laborer' in § 2(3) of the NLRA to § 3(f) of the FLSA."). Section 3(f) of the FLSA, in turn, ties the definition of "agricultural laborer" to that of "[a]griculture," which it defines to mean "farming in all its branches" and to include

> the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

In *Bayside*, this Court stated that the term "agriculture" in the FLSA "includes farming in both a primary and secondary sense." 429 U.S. at 300. The Court explained that "[t]he raising of poultry is primary farming, but hauling products to or from a farm is not primary farming." *Id.* at 300-301. Such hauling may be "secondary farming," the Court observed, "if it is work performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations.'" *Id.* at 301 (quoting 29 U.S.C. 203(f)). Applying those principles, the Court upheld the Board's determination that truck drivers who hauled poultry feed from their employer's feed mill to the farms on which independent contract growers raised the employer's chickens were not engaged in "secondary farming" and hence were not "agricultural laborers." *Id.* at 301-304. The Court accepted the Board's view that the drivers' activities were not work performed "by a farmer," because "their employer's operation of the feedmill [was] a nonagricultural activity," and the farming activities of

the independent contract growers were not attributable to their employer, because its status as a farmer engaged in raising poultry ended when it contracted with the independent growers for the care and feeding of the chicks. *Id.* at 302-303.

Petitioners argue that, unlike the truck drivers in *Bayside*, the live haul employees in this case work "on a farm." Pet. 60-61; see also NBC Br. 11. The fact that an employee works on a farm, however, does not necessarily make the employee an "agricultural laborer." The employee's work must also be performed "as an incident to or in conjunction with [the] farming operations." 29 U.S.C. 203(f). That condition is not met here. The work of the live haul employees is not performed "incident to or in conjunction with" the farming operations of the independent growers. Those operations consist in the raising of chicks into full-grown chickens. That operation ends when the chicks have reached maturity, and it is only at that point that the work of the live haul employees begins. Thus, the activities of the live haul workers are incidental, not to the operations of the independent growers, but instead to petitioners' poultry slaughtering operation. The latter operation is not "farming" within the meaning of Section 3(f). See *Bayside*, 429 U.S. at 301.[13]

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[13] For the same reason, NBC errs in suggesting (Br. 10) that the live haul truck drivers, in particular, are "agricultural laborer[s]" because their work involves "delivery to storage or to market or to carriers for transportation to market" for purposes of Section 3(f) of the FLSA. Such delivery constitutes "agriculture" under Section 3(f) only if it is "incident to or in conjunction with" a "farming operation[]." The work of the live haul drivers is not "incident to" the farming operations of

That conclusion accords with Congress's purpose for including the phrase "on a farm" in Section 3(f) of the FLSA. As this Court has explained, Congress included that phrase to exempt from FLSA coverage the employees of specialized independent contractors, such as an employee who hauls his threshing machine "from farm to farm" and who "makes a business of doing nothing but threshing." *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 766-767 & n.16 (1949) (internal quotation marks omitted). Petitioners' live haul employees do not fall into that category, because petitioners do not make a business of providing chicken-catching and hauling services to farmers for hire.

b. Contrary to petitioners' contention (Pet. 58-60; see also NBC Br. 6-8), the decision below does not conflict with *Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980), or *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972).

Sanderson Farms was an action by live haul employees to recover overtime wages under the FLSA. The Fifth Circuit held that the employees were "agricultural laborers." 629 F.2d at 1080-1081. The court acknowledged that this Court had upheld the Board's contrary conclusion with respect to the live haul employees before the Court in *Bayside*. *Id.* at 1080. In reaching a different result, the Fifth Circuit emphasized the "different procedural posture" of the two cases. *Id.* at 1081 n.4. The court explained that *Bayside* applied a "policy of judicial deference" to the Board that was "inapplicable" in the case before it.

---

the independent growers; rather, it is "incident to" petitioners' poultry slaughtering operation.

Ibid. The Fifth Circuit thus recognized that, in an enforcement proceeding under the NLRA (such as *Bayside* and the present case), considerable deference would be due to the Board's determination of whether a group of employees were agricultural laborers, "regardless of how [the court] might have resolved the question as an initial matter." *Ibid.* (quoting *Bayside*, 429 U.S. at 304). Accordingly, *Sanderson Farms* does not conflict with the Fourth Circuit's decision in the present case to sustain the Board's determination that petitioners' live haul workers are not "agricultural laborers."

Nor does the decision below conflict with that of the Ninth Circuit in *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (1972). The Ninth Circuit's decision in *Ryckebosch* did not survive this Court's decision in *Bayside*. See *Bayside*, 429 U.S. at 299 & n.4 (noting "apparent conflict" between *Ryckebosch* and lower court decision affirmed in *Bayside*). In *Ryckebosch*, the court relied on *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), to hold that drivers who transported the employer's chickens from the farms of independent contract growers to processing plants were "agricultural laborers." 471 F.2d at 21. *Strain Poultry*, in turn, had held that an employer is engaged in the "raising of poultry" even if its chickens are raised to maturity by independent growers. 405 F.2d at 1032-1033. That holding cannot be squared with *Bayside*'s approval of the Board's rule that, "when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks." 429 U.S. at 302 n.9 (quoting *Imco Poultry*,

202 N.L.R.B. 259, 260 (1973)). Accordingly, there is no reason to believe that the Ninth Circuit today would decide this case any differently than the court below did.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-5583

HOLLY FARMS FOOD, INC.[1], EMPLOYER

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, PETITIONER

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1] The Employer's name appears as amended at the hearing.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons: (See Attached)[2]

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[2] The Employer is engaged in the operation of an integrated poultry business with hatcheries located in North Carolina at Wilkesboro, North Wilkesboro, Hayes, Seaford, Suncrest, Catawba and Fairplanes. In addition, the Employer has a feed manufacturing plant in Roaring River, North Carolina, and a processing plant which produces broilers for sale to retail stores. The Petitioner, in its petition, seeks a unit comprised of all hatchery, live haul and feed haul employees, including the following classifications: driving, maintenance, blood testers, quality control, injector, primary breeders, breeders, feather sexing, and chicken catchers at the Wilkesboro, North Wilkesboro, Hays [*sic*], Roaring River, Sea[ford], Suncrest, and Fairplanes, North Carolina facilities; but excluding all office employees, guards and supervisors as defined in the Act. At the hearing, the Petitioner asserted that an appropriate unit would in addition to the above classification, include all feed mill employees and feed mill mechanics at the Roaring River facility, plus the employees at the Employer's Catawba, North Carolina hatchery.

The Employer takes the position that all petitioned-for employees are agricultural employees specifically excluded from the definition of "employee" in Section 2(3) of the Act. It further asserts, in the alternative, that the petitioned-for employees fall into four separate categories: (a) hatchery employees, (b) live haul employees; (c) feed haul employees; and (d) blood test employees, which share a community of interest only within their separate groups. The Petitioner and the Employer each filed briefs which have been carefully considered.

The record indicates that chickens used for breeding purposes, called pullets or breeder chickens, and chickens destined for retail stores, called broilers, are both grown from the same process. Hatchery employees process eggs, which have been picked up and transported from breeder farms under contract with the Employer. The eggs are first put into setters and are then transferred to incubators. When the chicks hatch, they are vaccinated, de-beaked, sexed, boxed and shipped to the breeder farms where they are grown. Once grown, the chickens are separated into the categories of pullets and broilers. Chicken catchers, as part of live haul crews (which include, one truck driver, and one fork lift operator), catch the broilers, box them and transport them to the processing plant. Pullet movers catch the pullets, vaccinate them, box and then transport them to laying houses. The breeder chickens then lay eggs which are gathered by the contract farmer and hauled by the Employer's employees to the hatchery to start the process again. Additionally, about 80 percent of the breeder chickens are purchased as baby chicks from farms and are then combined with the hatchery-produced chickens at the laying house. The record reflect[s] that there is significant interchange among employees who are based at the hatchery locations. For example, hatchery employees are sent to gather eggs and to do the work of blood test department employees. The hatchery live haul drivers regularly perform hatchery and maintenance work. Also, blood test employees help hauling eggs, and help the pullet crews to catch chickens.

The record indicates that live haul employees consist of two separate and distinct groups, broiler catchers and pullet catchers. The broiler catchers work out of the processing plant while the pullet catchers and egg haulers work in the hatchery operations. There is no interchange between these classifications. Broiler haulers do not haul pullets and pullet haulers do not haul broilers.

The Employer's feed mill operation at Roaring River, North Carolina consists of a feed mill, where grain is processed into feed, and a truck service center. At this location, feed mill employees process the feed and feed haul drivers transport it to the contract farms. Mechanics at this location service

the trucks used to haul the feed. The record reflects that there is no interchange between the feed mill employees and any of the employees working in the hatcheries or the processing plant.

Section 2(3) of the Act excludes agricultural laborers from the classification of employees covered under the Act. Since 1946, Congress has added riders to the Board's appropriation bill providing that no part of the appropriation shall be used in connection with bargaining units composed of agricultural laborers as set forth in Section 3(f) of the Fair Labor Standards Act. Section 3(f) defines agriculture as follows:

> Agriculture includes farming in all its branches and includes . . . the raising of poultry, and practices, . . . performed by a farmer [or] on a farm as an incident to, or in conjunction with such farming operations. . . .

The hatchery employees, on the basis of the record herein, are clearly engaged in the raising of poultry within the meaning of Section 3(f) of the Fair Labor Standards Act. See, e.g. *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967); *Lindstrom Hatchery and Poultry Farms*, 49 NLRB 776 (1943); *Bayside Enterprises, Inc. vs. N.L.R.B.*, 429 U.S. 298, 50 L. Ed. 2d. 494, 97 S. Ct[.] 576 (1977). As to the employees who engage in the pickup and delivery operations at the hatcheries (who also perform hatchery and maintenance duties), it is clear that their work in the hatchery is likewise agricultural in nature. Moreover, although hauling, generally, would appear to be a non-farm activity, the employees making pickups and deliveries in the circumstances presented here, particularly considering the process and functional integration in the hatchery, are similarly engaged in the exempt activity of raising poultry. Therefore, I conclude that the egg haulers and pullet haulers are also agricultural workers. *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967).

As to the live haul employees, designated as chicken catchers, who work out of the processing plant, I conclude that their position is not included either in the primary or secondary definition of "agriculture" in Section 3(f) of the FLSA. In this connection, the Board has consistently held that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a

farmer engaged in the raising of poultry ends with respect to those chicks. *Impco* [*sic*] *Poultry, Division of International Multifoods Corporation*, 202 NLRB 259 (1973). Thus addressing the unit placement of the chicken catching crews, the record contains sufficient evidence of their functional integration, with other processing plant employees to warrant their inclusion with those employees, and would not otherwise warrant their inclusion in a separate unit.

Feed haul drivers do nothing but deliver grain to the contract farmers. These deliveries do not constitute work incident to the farmer's farm, but are, rather, work incident to the feed mill. By the same token, the feed mill employees and the mechanics are not involved in farming. Consequently, the feed mill employees, feed haul employees and the mechanics at the Employer's Roaring River, North Carolina factility [*sic*] are clearly non-agricultural employees. *Bayside Enterprise, Inc., vs. N.L.R.B.*, 429 U.S. 298, 50 L.Ed. 2nd. 494, 97 S. Ct. 576 (1977). The Petitioner, however, seeks a multi-location unit including all of the Roaring River employees along with the employees at the seven other locations of the Employer whom I have found to be agricultural employees. Further, the Petitioner, who for the first time at hearing included the feed mill employees in its petition, has not expressed a desire to represent only the Roaring River employees as a separate single location unit. Accordingly, as to the groups of individuals whom I have found to be agricultural employees, I find that no question affecting commerce exists within the meaning of 9(c)(1) of the Act, concerning the representation of "employees" as defined in Section 2(3) of the Act.

Moreover, as to those classification [*sic*] of employees whom I have concluded to be non-agricultural, and, therefore, subject to the coverage of the Act, I conclude that either the Petitioner has not sought their inclusion in an appropriate unit or as to the Roaring River employees has not expressed its desire to represent them as a single location unit. Therefore, I shall dismiss the petition in its entirety.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 10, 1989.

Dated March 27, 1989 /s/ Willie L. Clark, Jr.
Regional Director, Region [11]
at Winston-Salem, North Carolina

No. 95-210

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE THE NATIONAL BROILER COUNCIL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae the National Broiler Council will address the following question:

Did the divided Court of Appeals for the Fourth Circuit err in concluding, along with the Eighth Circuit, that chicken catchers, forklift operators, and live-haul drivers who catch, cage, and load live chickens on a farm for transportation to a producer's storage facility are not engaged in work "on a farm as an incident to or in conjunction with * * * farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market," 29 U.S.C. § 203(f), and are therefore not agricultural laborers, contrary to the law in the Fifth, Ninth, and Eleventh Circuits?

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HOLLY FARMS CORPORATION;
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BRIEF OF AMICUS CURIAE THE NATIONAL BROILER COUNCIL IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Organized in 1954, the National Broiler Council ("NBC") is a national trade association representing the producers and processors of more than 95 percent of the broiler/fryer chicken consumed in the United States. NBC and its 225 member companies have a vital interest in the fifth question presented by petitioners: whether

employees of vertically integrated poultry producers who perform the tasks on a farm of catching, caging, loading, and transporting live chickens are properly classified as agricultural laborers exempt from certain requirements of the National Labor Relations Act ("NLRA")—as they are in the Fifth, Ninth, and Eleventh Circuits—or instead as employees fully subject to the NLRA—as they are in the Fourth and Eighth Circuits. The vast bulk of the operations of NBC member companies are in the States covered by these five Circuits, and the activities of the chicken catchers, forklift operators, and live-haul drivers at issue in this case are typical of the operations of a vertically integrated poultry producer. The conflict among the Circuits thus concerns a question of great practical significance to NBC members that is ripe for resolution by this Court.[1]

STATEMENT OF THE CASE

The facts and procedural history of the case are fully set forth in the petition and will not be repeated here. *See* Pet. at 3-24.

As relevant to the interests of amicus curiae, this case arises from an order by the respondent, the National Labor Relations Board ("NLRB" or "Board"), concluding that a unit of petitioners' employees including, among other employees, "[a]ll live-haul employees (chicken catching crews) employed at the processing facility of the [petitioners] located at Wilkesboro, North Carolina" was an appropriate collective bargaining unit. Pet. App. at A-167 - A-168. The Board's order on this point was not unanimous. Board Member Oviatt dissented because he found that petitioners' live-haul employees[2] are agricultural laborers and therefore not covered by the NLRA. *Id.* at A-187 - A-188.

[1] This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

[2] For purposes of this brief, the term "live-haul employees" refers to persons employed by integrated poultry producers as chicken catchers, forklift operators, and live-haul drivers.

The Court of Appeals for the Fourth Circuit enforced the NLRB's order, over the partial dissent of Judge Niemeyer. Like Board Member Oviatt, Judge Niemeyer concluded that petitioners' live-haul employees were not properly included in the bargaining unit because they are agricultural laborers excluded from the NLRA's coverage. *Id.* at A-60.

SUMMARY OF ARGUMENT

The question presented has divided the NLRB, the Fourth Circuit below, and the Courts of Appeals across the country. It is an important question going to the scope of the statute governing labor relations and directly affects hundreds of employers and thousands of employees throughout the Nation. This Court should grant certiorari to resolve the direct and irreconcilable conflict that has arisen among the Circuits in addressing that recurring question.

In enforcing the order issued by a divided NLRB, the divided Fourth Circuit below held that petitioners' live-haul employees were not agricultural laborers under the NLRA and thus were appropriately included in a collective bargaining unit. This decision, which follows decisions of the Court of Appeals for the Eighth Circuit, is in direct conflict with a decision of the Fifth Circuit (which is also binding in the Eleventh Circuit) and a decision of the Ninth Circuit. Those courts have held that live-haul employees *are* agricultural laborers and thus not covered by certain provisions of the NLRA. *See Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. Unit A 1980) (live-haul drivers and forklift operators), *reh'g denied*, 644 F.2d 34 (5th Cir. Unit A Apr. 1981); *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972) (live-haul drivers). The Fourth Circuit's holding is also contrary to the statutory language of the

agricultural exemption, which clearly covers employees—such as the live-haul employees at issue here—who perform their work on a farm, catching, caging, loading, and transporting live chickens to storage for market in conjunction with the primary farming activity of raising poultry.

The conflict between the Fourth and Eighth Circuits, on the one hand, and the Fifth, Ninth, and Eleventh Circuits, on the other, covers the area of this country where most chickens are produced. In 1994, over 85 percent of the broiler chickens in this country were produced in the States within the Circuits comprising the split in authority. There is accordingly no need to let this important question "percolate" further in the lower courts. The overwhelming majority of live-haul employees and their employers are already subject to binding appellate authority on the question. The issue has been joined and has culminated in a sharp conflict among the Circuits. Employees for the same company performing the same tasks should not be treated differently under the national labor laws depending on the Circuit in which they happen to work. Competing poultry producers should not be at a competitive advantage or disadvantage depending upon the Circuit in which their operations are located. Workers engaged in the same tasks on chicken farms in Maryland and Georgia should be classified the same for purposes of the NLRA, but they are not. This Court should grant certiorari to resolve the conflict.

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT CONFLICTS WITH CONTROLLING AUTHORITY IN THE FIFTH, NINTH, AND ELEVENTH CIRCUITS AS TO WHETHER LIVE-HAUL EMPLOYEES ARE AGRICULTURAL LABORERS EXEMPT FROM THE NLRA

The NLRA excludes from its definition of an "employee" covered by the Act any individual employed as an "agricultural laborer." 29 U.S.C. § 152(3). The definition of "agricultural laborer" under the NLRA is provided by the Fair Labor Standards Act ("FLSA"). *See Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977). Section 3(f) of the FLSA specifies that "agriculture" includes:

> farming in all its branches and among other things includes * * * the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. [29 U.S.C. § 203(f).]

The Fourth Circuit, in enforcing the NLRB order, concluded that petitioners' live-haul employees were not agricultural laborers. Pet. App. at A-52. In reaching this conclusion, the Fourth Circuit agreed with the Court of Appeals for the Eighth Circuit, which had previously held that live-haul drivers of a vertically integrated poultry producer were not agricultural laborers. *Id.* at A-50-A-51 (citing *NLRB* v. *Hudson Farms, Inc.*, 681 F.2d 1105, 1106 (8th Cir.), *cert. denied*, 459 U.S. 1069 (1982); *Valmac Indus., Inc.* v. *NLRB*, 599 F.2d 246, 247, 249 (8th Cir. 1979)).

The Fourth Circuit's decision below, however, directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077, 1081 (5th Cir. Unit A 1980), *reh'g*

denied, 644 F.2d 34 (5th Cir. Unit A Apr. 1981), which held that live-haul drivers and loader operators[3] of a vertically integrated poultry producer were agricultural laborers under section 3(f) of the FLSA.[4] The contrary holding of the Fifth Circuit in *Coleman* was expressly noted by both the majority and the dissenting opinions of the Fourth Circuit below. The majority did not even attempt to distinguish the holding in *Coleman*, instead simply declaring that "[w]e decline to follow" it and contending that the Fifth Circuit was insufficiently deferential to the NLRB. Pet. App. at A-52 n.4. The dissent specifically relied on the Fifth Circuit's opinion, and noted the conflict between that decision and the Eighth Circuit's decision in *Hudson Farms*. Pet. App. at A-60 - A-61.

The Fourth Circuit's decision below, insofar as it concerns live-haul drivers, also directly conflicts with the Ninth Circuit's decision in *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20, 21 (9th Cir. 1972). In that case the Ninth Circuit concluded that live-haul drivers of a vertically integrated poultry producer were agricultural laborers exempt from the NLRA. The court rejected the opposite position urged by the NLRB and specifically followed a prior decision from the Fifth Circuit that was a predecessor to *Coleman*, *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), noting that "[t]he NLRB has not demonstrated that we need create a conflict between the Circuits on this point." 471 F.2d at 21. Now, with contrary decisions from the Eighth and Fourth Circuits, the NLRB has its conflict.

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[3] The "loader operators" considered by the Fifth Circuit in *Coleman* perform the same duties as the forklift operators in the instant case. *Coleman*, 629 F.2d at 1079.

[4] The Fifth Circuit's precedent in *Coleman* is also binding on the Court of Appeals for the Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), (en banc) (adopting as Eleventh Circuit precedent all decisions of the Fifth Circuit handed down before October 1, 1981).

The conflicting conclusions of the Circuits cannot be explained away on the ground that the courts looked to different authorities. There is accordingly no basis for hoping the courts might be reconciled on reconsideration, without the need for intervention from this Court. The Fourth, Fifth, and Eighth Circuits each looked to the statute and this Court's decision in *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977), in considering the question presented.

In *Bayside*, this Court upheld an NLRB order that concluded that employees who trucked poultry *feed* from the premises of their *employer* (a vertically integrated poultry producer) to the premises of independent contract farmers who raised the chickens were not agricultural laborers. *Id.* at 303-304. The Courts of Appeals differ as to the impact of *Bayside* on the question whether the live-haul employees at issue here, who perform different tasks than the employees in *Bayside*, are agricultural laborers. The Eighth Circuit has held that the status of live-haul drivers (who truck live chickens from the contract farms to storage on the premises of the integrated poultry producer) was indistinguishable from the status of the feed carriers at issue in *Bayside*. *Valmac Indus.*, 599 F.2d at 249. The Fifth Circuit in *Coleman*, however, concluded that *Bayside* did not control the issue of whether live-haul employees (as opposed to feed carriers) were agricultural laborers. 629 F.2d at 1081.

Nor can the conflict be explained away by noting that the Fifth Circuit in *Coleman* was considering a case under the FLSA and not the NLRA. As discussed above, the NLRA does not define an "agricultural laborer," but rather depends on the definition provided in section 3(f) of the FLSA—the very statutory section interpreted by the Fifth Circuit in *Coleman*. In addition, although the Fifth Circuit in *Coleman*, unlike the Fourth Circuit below, was not considering an order of the NLRB, *Coleman*, 629 F.2d at 1081 n.4, there can be no question that—having

interpreted section 3(f) of the FLSA to include live-haul drivers and loader operators as agricultural laborers—the Fifth Circuit would reach the same conclusion if the issue arose under the NLRA. In either case the issue is governed by the same statutory language, and basic principles of *stare decisis* require the Fifth Circuit to interpret section 3(f) of the FLSA consistently, regardless of the position the NLRB may take in a later case. *See Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").[5] Indeed, the Fifth Circuit in *Coleman* expressly reaffirmed the validity of its holding in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), which "held that live haul truckers were agricultural workers exempt from coverage under the National Labor Relations Act," 629 F.2d at 1079 (footnote omitted), despite the contrary view of the NLRB.

Although the Ninth Circuit's decision in *Ryckebosch* predates this Court's decision in *Bayside* and is mentioned in *Bayside* as being in "apparent" conflict with the Court of Appeals decision affirmed in *Bayside*, 429 U.S. at 299 & n.4, it is still good and controlling law. The employees at issue in *Bayside* performed a different job than the employees in *Ryckebosch*—presumably the reason this Court described the conflict as only "apparent."[6] The

[5] The fact that the *Coleman* court's analysis would not be affected by the NLRB's contrary reading is confirmed by the fact that the holding in *Coleman* was based on "the plain language of the statute." 629 F.2d at 1079. No amount of agency deference can lead to a reading contrary to a statute's plain language. *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 368 (1986).

[6] The Fifth Circuit in *Coleman* also considered the effect of this Court's opinion in *Bayside* on its opinion in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), the case the

Bayside employees transported feed to chickens on contract farms, while the *Ryckebosch* employees transported live chickens from contract farms to storage for market. The difference is plainly pertinent under the statutory language. The raising of poultry is explicitly defined as agriculture under the FLSA (and, thereby, the NLRA), as is its "delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. § 203(f). Transporting feed to a farm, in contrast, does not fit within the statutory definition.

II. ACCORDING TO THE CLEAR LANGUAGE OF THE AGRICULTURAL EXEMPTION, CHICKEN CATCHERS, FORKLIFT OPERATORS, AND LIVE-HAUL DRIVERS ARE AGRICULTURAL LABORERS EXEMPT FROM THE NLRA

The Fourth Circuit below held that individuals employed by petitioners as chicken catchers, forklift operators, and live-haul truck drivers may properly be included in a collective bargaining unit under the NLRA. These employees work in teams[7] on farms of independent contract farmers who raise the broiler chickens owned by petitioners. The teams go to the farms at night, transported on flat bed trucks driven by the live-haul drivers. Once at the farm, the chicken catchers catch and cage the chickens. The forklift operator then places the cages

Ryckebosch court followed and which was cited in *Bayside* along with *Ryckebosch* as being in "apparent conflict" with the lower court opinion in *Bayside*. 429 U.S. at 299 & n.4. Like the Ninth Circuit in *Ryckebosch*, the Fifth Circuit in *Strain Poultry* was considering live-haul drivers, not feed drivers as in *Bayside*. In *Coleman*, the Fifth Circuit came to the conclusion that *Strain Poultry*'s holding as to live-haul employees was not overruled by this Court's decision in *Bayside*. *Coleman*, 629 F.2d at 1080. For the same reason, the Ninth Circuit's holding in *Ryckebosch* is still good law.

[7] Each team consists of one live-haul driver, one forklift operator, and about nine chicken catchers. Pet. App. at A-40 - A-41.

on the flat bed truck, which is driven by the live-haul driver to a storage area near petitioners' processing plant. The live-haul drivers also occasionally assist the chicken catchers in catching and caging the fowl. Pet. App. at A-58. *See also Coleman*, 629 F.2d at 1078 (such "operations are apparently typical of those prevailing in the poultry industry").

Under the plain language of the definition of "agriculture" in the FLSA, these employees are agricultural employees. The chicken catchers and forklift operators work "on a farm" doing tasks in conjunction with farming operations. The live-haul drivers are also clearly included in the definition of section 3(f) as persons performing the "delivery [of poultry] to storage or to market or to carriers for transportation to market."

This Court's decision in *Bayside* is not to the contrary. The employees at issue in that case did not perform their work "on a farm," nor did they transport poultry or other agricultural products to market or to storage for market. The Court explained that "[s]ince there is no claim that these drivers work 'on a farm,' the question is whether their activity should be regarded as work performed 'by a farmer.'" 429 U.S. at 301. In making this determination, this Court held that "the status of the [employees in question] is determined by the character of the work which they perform for their own employer." *Id.* at 303.

While that was true in *Bayside*, it is not true here. This Court in *Bayside* looked to the character of the employer's operations because it was considering whether the work in question was being performed "by a farmer." The statute, however, applies to practices performed "*either* by a farmer *or* on a farm." 29 U.S.C. § 203(f) (emphases added). If the work is performed "on a farm" and otherwise meets the criteria set forth in the statute, it makes no difference that the worker's employer may not be a farmer under the statute. The worker is still an agricultural laborer because of the nature of the work he performs "on a farm."

As this Court has held, the definition of "agriculture" provided by the FLSA includes two distinct branches. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762 (1949). The primary meaning of agriculture encompasses "farming in all its branches." *Id.* The secondary branch of the definition includes "any practices * * * which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Id.* at 763. Petitioners below conceded that their live-haul employees were not engaged in primary agriculture. Pet. App. at A-44. Petitioners' live-haul employees are nonetheless agricultural laborers because the tasks they perform "on a farm" are clearly "incident to or in conjunction with" the farming operations of the independent contract growers.

The NLRB reaches a contrary conclusion by arguing that "when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks." *See Bayside*, 429 U.S. at 302 n.9 (quoting *Imco Poultry*, 202 N.L.R.B. 259, 260 (1973) (additional citations omitted)). Hence, to the NLRB, the character of the work performed by the employees at issue makes no difference, nor does the fact that they perform that work on a farm, because petitioners are integrated poultry processors and the chicks have left their premises to be raised. This analysis—upheld by the Fourth Circuit below—is contrary to the plain language of the statute, in that it focuses on whether the employer is a farmer and totally ignores that the agricultural exemption may also be triggered by the nature of the work performed by the employees "on a farm."

III. THE EXISTING CONFLICT AMONG THE CIRCUITS COVERS NEARLY ALL LIVE-HAUL EMPLOYEES AND EMPLOYERS IN THE COUNTRY AND IS RIPE FOR RESOLUTION BY THIS COURT

The stark conflict among the Circuits on the status of live-haul employees under the NLRA warrants this Court's attention. Under the ruling of the Eighth Circuit and the Fourth Circuit below, NBC members are required to bargain with units comprised of live-haul employees; in the Fifth, Ninth, and Eleventh Circuits, NBC members need not bargain collectively with these employees, because they have been characterized as agricultural laborers exempt from the NLRA. The Courts of Appeals that have addressed and disagreed on this issue have jurisdiction over the top six (and nine of the top ten) broiler producing States.[8] Over 85 percent of the broilers produced in 1994 were produced within the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits.[9] Put simply, we have heard from the Courts of Appeals that are likely to be heard from on this issue, and the result is a sharp conflict.

Accordingly, the existing split in authority between the Fourth and Eighth Circuits, on the one hand, and the Fifth, Ninth, and Eleventh Circuits, on the other, affects

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[8] *See* United States Department of Agriculture, National Agricultural Statistics Service, *Poultry Production and Value 1994 Summary* 5 (May 1995). The top ten States, in order of number of broilers produced in 1994, were as follows: (1) Arkansas, (2) Georgia, (3) Alabama, (4) North Carolina, (5) Mississippi, (6) Texas, (7) Maryland, (8) Delaware, (9) Virginia and (10) California. *Id.*

[9] In 1994, a total of 7,017.5 million broiler chickens were produced in the United States. *Id.* Of that number, over 2,715.1 million broilers were produced in States located in the Fourth and Eighth Circuits (where live-haul employees are not agricultural laborers), and 3,310.6 million broilers were produced in States located in the Fifth, Ninth, and Eleventh Circuits (where live-haul employees are agricultural laborers). *See id.*

an overwhelming majority of the live-haul employees in the country, on an issue of undeniable importance to those employees and their employers. The NLRA should not apply to some live-haul employees but not others, based simply on the happenstance of the Circuit in which the employees work. The operations of vertically integrated poultry producers span the conflicting Circuits, so employees of the same company performing the same tasks are now subject to different treatment under the national labor laws depending upon the State in which they work. At the same time, competing poultry producers may be at a competitive advantage or disadvantage, depending upon whether their operations are in a State in which they must bargain collectively with their live-haul employees. This Court should grant certiorari so that these employees can be dealt with in a uniform manner throughout the country.

The NLRB, through the Solicitor General, has previously explained why a conflict among the Circuits of the sort at issue here warrants this Court's attention. In acquiescing in certiorari in *Bayside*, the Solicitor General explained that the question presented was "a recurring one in the administration of the NLRA," that "there are serious practical objections to having a conflict in the circuits on this issue" (including the fact that "the conflict among the circuits furnishes a strong inducement for forum shopping"), and that "resolution of the issue would have a direct impact on cases arising under the FLSA * * * as well as on those arising under other statutes which refer to agricultural laborers or employees." Brief for Respondent, *Bayside Enterprises, Inc.* v. *NLRB*, No. 75-1267, at 9 & n.8 (citations omitted). All of these reasons apply even more strongly in this case, where the conflict is both sharper and broader than it was in *Bayside*.

CONCLUSION

For the foregoing reasons, and those in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 95-210

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED NOVEMBER 6, 1995

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IN THE MATTER OF: HOLLY FARMS CORPORATION AND TYSON FOODS, INC.

BOARD CASE NOS. 11-RC-5583, 11 CA-13184, 11-CA-13267, 11-CA-13487, 11-CA-13520, and 11-CA-13619

Date	Documents
2-8-89	Initial Unfair Labor Practice Charge
2-16-89	Representation Petition filed in Case No. 11-RC-5583
3-14-89	Representation Hearing in Case No. 11-RC-5583
3-27-89	Decision and Order in Case No. 11-RC-5583
4-28-89	Order Reopening Case and Reopening Hearing and Notice of Hearing in Case No. 11-RC-5583
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5-18-89	Initial Unfair Labor Practice Complaint
6-1-89	Initial Answer
6-20-89	Supplemental Decision and Direction of Election in Case No. 11-RC-5583
7-20-89	Decision on Review and Order in Case No. 11-RC-5583
10-13-89	Order Consolidating Cases, Consolidated Complaint and Notice of Hearing
11-27-89	Hearing on Consolidated Cases Opens

Date	Documents
5-2-90	Hearing on Consolidated Cases Closes
3-12-92	Decision of Administrative Law Judge
5-28-93	Board's Decision and Order
3-10-95	Opinion of United States Court of Appeals for the Fourth Circuit
5-9-95	Order Denying Petition for Rehearing with Suggestion for Rehearing In Banc
8-4-95	Petition for Writ of Certiorari
11-6-95	Order Allowing Certiorari

APPENDIX A

NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-5583

In the Matter of:

HOLLY FARMS FOODS, INC.

AND

CHAUFFEURS, TEAMSTERS, AND HELPERS LOCAL UNION NO. 391, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

Pages: 1-158

Place: WINSTON-SALEM, NORTH CAROLINA

Date: TUESDAY, MARCH 14, 1989

* * *

[13] DIRECT EXAMINATION

BY MR. HUDSON:

Q. Mr. Whittington, will you state your name for the record, please?

A. Sam Whittington.

Q. And who are you employed by?

A. Holly Farms.

Q. In what capacity are you employed?

A. I'm the live production manager.

Q. Okay, Mr. Whittington, could you describe in general terms Holly Farms operations in North Carolina?

A. What we do we take baby chicks as we call pullets and we place these in pullet growing houses. We raise these pullets up to twenty weeks of age. We move them from the pullet house – we have the pullet movers – to a laying house where we collect the hatching eggs and – by contract farmers. Then, we bring the hatching eggs in by the egg haulers to our hatchery facilities.

We hatch the baby chicks. We process the baby chicks there in the hatchery by piggy back system where that we trim the beaks and vaccinate the birds. Then, these birds go from the hatchery back out to contract growers. They keep the [14] birds there for about seven weeks of age. Just makes a fryer or the bird that ends up at the supermarket. These are where the catchers go out and catch the bird from the farms and bring them back into out processing facilities.

And, in that we have feed delivery department where that – the feed mill where we make the different type feeds that we feed the pullets, the hens and the broilers. Then, we have feed delivery guys that deliver the feed from the feed mill out to the growing farms.

Q. Are you familiar with the petition of the labor Union that's seeking to represent certain job descriptions at Holly Farms?

A. Yes, sir.

Q. And, I'm going to ask you a couple questions concerning those jobs. The chicken catchers – could you describe for us the job duties that a chicken catcher has?

A. The catcher, himself, he catches the birds at the broiler growing farm. Puts them into a cage and you want the rest of what goes with him? Catchers?

Q. Yes.

A. Then, we have drivers that drive the trucks out to the – we have a crew – let me start off. We have a crew that goes to the catching farm. In that we have the truck drivers and we have a fork lift operator. And we have nine catchers and a supervisor that makes up a catching crew. And, they leave our [15] facilities, go out to the catching farm, catch their days chickens. The forklift operator drives a truck to the farm and he operates a forklift by putting the cages inside the broiler house for the catchers to put the birds in. Loads the truck back and then the drivers, then take the trucks to and from the farm.

Q. What does a chicken catcher work out of? What facility?

A. At the processing plant.

Q. Do they have their own office at the processing plant?

A. Yes, sir.

Q. The pullet movers – could you describe what they do and the difference between a pullet mover and a chicken catcher?

A. The pullet movers are in the hatchery area. They're the people – when we take the pullet and raise it up to twenty weeks of age – we get ready to move it to the laying farm – they're the guys that go out and catch these pullets and then we have a group of guys with them that vaccinate the birds at that same process and then we move them to the laying house.

Q. For the record, what is a pullet?

A. A pullet is a female young hen before she starts laying eggs.

Q. A pullet is not used – doesn't go through the normal life haul operation, is that correct?

A. No.

Q. They're used for laying eggs.

[16] A. Right.
Q. What do the pullet movers work out of?
A. They work out of the hatchery department.
Q. Which hatchery?
A. Hatchery number two.
Q. Is that the only facility?
A. Yes.
Q. Okay. Let's start with the live haul drivers. They go, as you said, with the live haul crew. Where do they transport chickens from and to?
A. From the contract grower back to the processing facilities.
Q. Okay. Where do they report in and out of?
A. They report into the live haul operation at the processing plant.
Q. Same place as the chicken catchers?
A. Yes.
Q. And, the forklift operators?
A. The same facilities. They work as a unit.
Q. Do they – they work as a unit at all times?
A. Yes.

* * *

[21] Q. The feed drivers – the feed mill drivers – could you describe their job?
[22] A. The drivers are the men that deliver the feed to the different birds – the pullets, the hens and the broilers. What they do, they pick up their load of feed at the feed mill. They load their feed. They take it out to the growing farm, unload the feed as it's instructed by the delivery sheet.
Q. And, they report in and out of where?
A. Roaring River.
Q. And, they unload and load themselves?
A. Yes.

Q. What kind of facilities are located at Roaring River?
A. At Roaring River we have the feed mill where we manufacture the feed and then in a separate department we have the feed deliver men and then, on that same facility, we have a shop there.
Q. So, the feed mill's a different facility then the deliver?
A. Yes, two different departments.

* * *

[27] Q. Who is the live haul driver – who is their supervisor?
A. Ray Loven.
Q. And, the forklift operators?
A. The forklift operator would be under the supervisor of each crew. And, that supervisor reports to Ray Loven.
Q. So, each crew has its own supervisor?
A. Right.
Q. Approximately how many crews are there?
A. There's twelve.
Q. And, a crew consists of the forklift, the chicken catchers and the drivers.
[28] A. That's right.

* * *

[37] Q. * * * But let's start with pullets. Pullets, I understand, are breeder chickens. Is that right. They're the ones who are going to lay the eggs.
A. That's correct. Yes, sir.
Q. And, you get those from somewhere – from some where other than Holly Farms. Is that right?
A. Part of them we buy from breeder companies as a baby chick and a portion of those chickens we produce ourselves.

Q. Is it fair to say that the largest proportion are the ones that you buy?

A. Yes.

Q. Do you know about what the percentages would be on that?

A. 80% or better.

Q. 80% or more you buy from somebody outside the Company.

A. As baby chicks.

Q. Now, when you buy them from outside the Company as baby chicks they're then taken from the place that you buy them to some farmers who are going to raise them. Is that right?

A. True, yes.

Q. Now, the farmers who raise them are not Company employees. They're independent. Is that correct?

A. They're contract growers.

Q. Okay. What are the people called who take these breeders from the place that you buy them to the contract growers?

A. That's the people that sell the product. They deliver [38] them on their truck.

Q. So, you don't have any people –

A. We have service personnel that help unload the chickens at the farm.

Q. Who is that?

A. That is the breeder service men, pullet service men.

Q. But they're not any of the job descriptions we've been through here?

A. No.

Q. Okay. Tell me again. They are called contract growers? Is that –

A. Yes, sir.

Q. Now, the time these contract growers get these breeder chickens the chickens are within a week old. Is that right?

A. Yes. One or two days old.

Q. Okay. And, the contract grower raises these chickens until twenty weeks?

A. Yes.

Q. And, I'm talking about breeders again.

A. That's right.

Q. All that growing is done by the contract grower and that's not done by Company people?

A. The facilities that the chickens are in are by the farmer – by the contract grower.

Q. Okay.

[39] A. We have employees that supervisor those growers.

Q. Who are those employees?

A. Those are the pullet service men that we referred to earlier.

Q. But there again, they're not part of the group classifications here?

A. No.

* * *

[41] Q. The pullet movers will load the grown chickens onto the truck, drive the truck to the laying house and then unload the [42] truck. Is that a fair description of what they do?

A. Yes.

Q. Okay. Now, the laying houses, are those owned by Holly Farms or are those independent?

A. They're independent farmers.

Q. And, so the independent farmers will see to the laying of eggs –

A. Through the supervision of our personnel, yes.

Q. And, again, who supervises them?

A. The breeder service personnel.

Q. And, those aren't within the bargaining unit proposed here either?

A. No.

Q. So, after the eggs are hatched, then we have egg haulers that come out to pick up the eggs, is that right?

A. That's right.

Q. And, are the eggs collected by the farmers and put in one place?

A. Yes.

Q. Are they put into cartons or something so they won't break?

A. Into cartons, yes.

Q. And, that's done by the people who operate the laying houses?

A. The farmer.

[43] Q. So, the egg hauler takes those cartoned eggs and puts them on the truck and drives them to the hatchery. Is that right?

A. That's right.

Q. And, unloads them at the hatchery?

A. Correct.

Q. And, that's all the egg hauler does?

A. Yes.

Q. Now we're in the hatchery. Is the hatchery owned by Holly Farms?

A. Yes.

Q. So – so when the eggs are unloaded at the hatchery someone takes them and puts them into incubators or something?

A. Yes.

Q. Who does that?

A. The production people in the hatchery.

Q. Okay. And the production people are within our proposed unit?

A. Yes.

Q. They put them in incubators. Do they do anything else to them before they hatch?

A. No, sir.

Q. And, when they hatch they pull the baby chicks out of the incubators and put them onto some kind of conveyor belt?

A. They're put into sitters and then employees transfer them [44] from the sitters to a hatcher and then when they hatch then they pull them out and put them onto the belt.

Q. Let's go back a minute. They put them into sitters or setters?

A. Setters.

Q. S-e-t-t-e-r. What's a setter?

A. A setter is where the eggs stay eighteen days.

Q. And, that's before they hatch, obviously, if they're eggs. Are they kept warm there?

A. Sure.

Q. And, who is it that puts them into the setters –

A. Production people in the hatchery.

Q. And, the production people than take them from the setter to the incubator where they hatch?

A. Yes.

Q. And, then, once they hatch, the production people take them from the incubator to some kind of conveyor belt?

A. Yes.

Q. Okay. And, the production people also sort of keep the place clean, too?

A. That's right.

Q. Is that all that the production people do?

A. Keeping things clean and sitting the eggs – transferring the eggs – when you say clean, they are washing and disinfecting the hatchers each time that you pull a hatch of [45] chickens out of them.

Q. So, now while we've gone from the egg haulers to unloading the trucks to putting them on the setters to putting them in incubators to putting them in the conveyor belt, plus keeping things clean and disinfecting and all that. We're now on the conveyor belt, okay.

The baby chicks go down the conveyor belt, at which point what happens to them?

A. The ladies that are paid by the box picks the chicks up, trims the beak and vaccinates the chicken.

* * *

[46] Q. So, they're debeaked and vaccinated and then what?

A. Then, they're ready to be delivered to the growing farm if they're broilers. If they're going to be sexed – then they are sexed and then delivered to the growing farm.

* * *

[47] Q. And the chick delivery boys take them out to farms where they're to be grown?

A. That's correct.

Q. Now, the people who grow them on these farms are, again, independent contract growers, is that right?

A. Right.

Q. So, the chick delivery boys, their function is to take boxes of newly born chicks, put them on a school bus or a bus of some sort and take them out and deliver them to the people who are going to grow them. Is that correct?

A. That's correct.

Q. Do they unload them there?

A. Yes.

Q. Take them off the bus and put them down?

A. Put them in the house.

Q. And, at this point, you said they're within – this is the day that they're hatched.

A. That's right.

Q. How long do they stay at the independent contract [48] growers?

A. Basically forty-nine days.

Q. Are they inoculated or vaccinated in that time?

A. No, sir.

Q. So, the next interaction the Company has with these contract growers, except for possibly some supervision, is when they pick them up after forty-nine days.

A. That's correct.

Q. Who picks them up?

A. The catchers – live haul.

Q. This crew that we're talking about, the catcher live haul crew?

A. That's right.

Q. Now, the catcher live haul crew primarily consists of catchers and drivers.

A. Forklift –

Q. And forklift people. Do the forklift people come out to the farms?

A. Sure.

Q. So, there are three types of people who come out to the farms that pick them up.

A. That's right.

Q. And, when you say catcher what catcher means is they run around the ground grabbing them and putting them in boxes or cartons or cages or something. Is that right?

[49] A. Basically, yes.

Q. And, the forklift people take those cages and lift them up onto the truck, is that right?

A. That's right.

Q. And, the other people are called live haul, is that right?

A. These people are live haul.

Q. The live haul drivers will then drive them from the independent grower to the processing plant?

A. Correct.

Q. And, then will they unload them there?

A. They park the truck there.

Q. Park the truck there and somebody else unloads it.

A. Correct.

Q. Who unloads it?

A. People at the processing plant.

Q. Is the processing plant Holly Farms owned place?

A. Yes.

Q. Are the people who unload the trucks there and go in the processing plant, are those part of the unit that we've proposed here?

A. No, sir. Not the ones that unload the chickens if that's what you're referring to.

Q. That's what I meant by that question. So, when we look at this crew that goes out to these independent growers, they [50] pick up grown chickens that are going to be broiler chickens, these aren't breeders anymore. Is that right?

A. That's right.

Q. They run around the ground, they catch them and put them in cages, load them on the trucks and then drive them to the processing plant. Is that right?

A. That's –

Q. Do they vaccinate them there? I mean do they vaccinate them when they catch them?

A. No.

* * *

[57] Q. * * * The contract growers who actually grow the breeder chickens up to twenty weeks get paid by the square footage?

A. That's correct.

Q. Of their farm?

A. Right.

Q. The laying facility operators get paid by the number of eggs they get picked up by Holly Farms?

A. That's correct.

Q. And, the broiler growers who take the one day old or newly hatched baby chicks and raise them to forty-nine weeks, how do they get paid?

A. By the thousand of birds.

* * *

[110] Q. Let me have a minute please. One other question. We talked about the chicken catchers going out there and running down the chickens and putting them in boxes. And, those are employees of Holly Farms but, the farm hands who work on the farm on a day to day basis are employees of the independent contractor, is that correct?

A. If they have –

MR. HUDSON: Objection.

[111] BY MR. LESSLEY:

Q. If they have any?

MR. HUDSON: I don't believe he has knowledge of who the farmer hires as an employee.

BY MR. LESSLEY:

Q. If you know.

MR. HOGG: We would be willing to agree that if the farmer has any employees, they're his employee but, we don't know whether he does or not.

HEARING OFFICER REESE: Do you know whether the farmer has employees?

THE WITNESS: Some farmers do. Basically, it's the owner of the farm that looks after the chickens.

HEARING OFFICER REESE: Objection is overruled.

* * *

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-5583

HOLLY FARMS FOOD, INC. [1]

Employer

and

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 391, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons:[2]

(See Attached)

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by April 10, 1989.

Dated March 27, 1989 /s/ Willie L. Clark, Jr.
Regional Director, Region

at Winston-Salem, North Carolina

[SEAL]

[1]The Employer's name appears as amended at the hearing.

[2]The Employer is engaged in the operation of an integrated poultry business with hatcheries located in North Carolina at Wilkesboro, North Wilkesboro, Hayes, Seaford, Suncrest, Catawba and Fairplanes. In addition, the Employer has a feed manufacturing plant in Roaring River, North Carolina, and a processing plant which produces broilers for sale to retail stores. The Petitioner, in its petition, seeks a unit comprised of all hatchery, live haul and feed haul employees, including the following classifications: driving, maintenance, blood testers, quality control, injector, primary breeders, breeders, feather sexing, and chicken catchers at the Wilkesboro, North Wilkesboro, Hays, Roaring River, Seacrest, Suncrest, and Fairplanes, North Carolina facilities; but excluding all office employees, guards and supervisors as defined in the Act. At the hearing, the Petitioner asserted that an appropriate unit would in addition to the above classification, include all feed mill employees and feed mill mechanics at the Roaring River facility, plus the employees at the Employer's Catawba, North Carolina hatchery.

The Employer takes the position that all petitioned-for employees are agricultural employees specifically excluded from the definition of "employee" in Section 2(3) of the Act. It further asserts, in the alternative, that the petitioned-for employees fall into four separate categories: (a) hatchery employees; (b) live haul employees; (c) feed haul employees; and (d) blood test employees, which share a community of interest only within their separate groups. The Petitioner and the Employer each filed briefs which have been carefully considered.

The record indicates that chickens used for breeding purposes, called pullets or breeder chickens, and chickens destined for retail stores, called broilers, are both grown from the same process. Hatchery employees process eggs, which have been picked up and transported from breeder farms under contract with the Employer. The eggs are first put into setters and are then transferred to incubators. When the chicks hatch, they are vaccinated, de-beaked, sexed, boxed and shipped to the breeder farms where they are grown. Once grown, the chickens are separated into the categories of pullets and broilers. Chicken catchers, as part of live haul crews (which include, one truck driver, and one fork lift operator), catch the broilers, box them and transport them to the processing plant. Pullet movers catch the pullets, vaccinate them, box and then transport them to laying houses. The breeder chickens then lay eggs which are gathered by the contract farmer and hauled by the Employer's employees to the hatchery to start the process again. Additionally, about 80 percent of the breeder chickens are purchased as baby chicks from farms and are then combined with the hatchery-produced chickens at the laying house. The record reflect that there is significant interchange among employees who are based at the hatchery locations. For example, hatchery employees are sent to gather eggs and to do the work of blood test department employees. The hatchery live haul drivers regularly perform hatchery and maintenance work. Also, blood test employees help hauling eggs, and help the pullet crews to catch chickens.

The record indicates that live haul employees consist of two separate and distinct groups, broiler catchers and pullet catchers. The broiler catchers work out of the processing plant while the pullet catchers and egg haulers

work in the hatchery operations. There is no interchange between these classifications. Broiler haulers do not haul pullets and pullet haulers do not haul broilers.

The Employer's feed mill operation at Roaring River, North Carolina consists of a feed mill, where grain is processed into feed, and a truck service center. At this location, feed mill employees process the feed and feed haul drivers transport it to the contract farms. Mechanics at this location service the trucks used to haul the feed. The record reflects that there is no interchange between the feed mill employees and any of the employees working in the hatcheries or the processing plant.

Section 2(3) of the Act excludes agricultural laborers from the classification of employees covered under the Act. Since 1946, Congress has added riders to the Board's appropriation bill providing that no part of the appropriation shall be used in connection with bargaining units composed of agricultural laborers as set forth in Section 3(f) of the Fair Labor Standards Act. Section 3(f) defines agriculture as follows:

> Agriculture includes farming in all its branches and includes . . . the raising of poultry, and practices, . . . performed by a farmer on a farm as an incident to, or in conjuction with such farming operations . . .

The hatchery employees, on the basis of the record herein, are clearly engaged in the raising of poultry within the meaning of Section 3(f) of the Fair Labor Standards Act. See, e.g., *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967); *Lindstrom Hatchery and Poultry Farms*, 49 NLRB 776) (1943); *Bayside Enterprises, Inc. vs. N.L.R.B.*, 429 U.S. 298, 50 L. Ed. 2d. 494, 97 S. Ct 576 (1977). As to the employees who engage in the pickup and delivery operations at the hatcheries (who

also perform hatchery and maintenance duties), it is clear that their work in the hatchery is likewise agricultural in nature Moreover, although hauling, generally, would appear to be a non-farm activity, the employees making pickups and deliveries in the circumstances presented here, particularly considering the process and functional integration in the hatchery, are similarly engaged in the exempt activity of raising poultry. Therefore, I conclude that the egg haulers and pullet haulers are also agricultural workers. *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967).

As to the live haul employees, designated as chicken catchers, who work out of the processing plant, I conclude that their position is not included either in the primary or secondary definition of "agriculture" in Section 3(f) of the FLSA. In this connection, the Board has consistently held that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks. *Impco Poultry, Division of International Multifoods Corporation*, 202 NLRB 259 (1973). Thus addressing the unit placement of the chicken catching crews, the record contains sufficient evidence of their functional integration, with other processing plant employees to warrant their inclusion with those employees, and would not otherwise warrant their inclusion in a separate unit.

Feed haul drivers do nothing but deliver grain to the contract farmers. These deliveries do not constitute work incident to the farmer's farm, but are, rather, work incident to the feed mill. By the same token, the feed mill employees and the mechanics are not involved in farming. Consequently, the feed mill employees, feed haul employees and the mechanics at the Employer's Roaring

River, North Carolina facility are clearly non-agricultural employees. *Bayside Enterprise, Inc. vs. N.L.R.B.*, 429 U.S. 298, 50 L.Ed. 2nd. 494, 97 S. Ct. 576 (1977). The Petitioner, however, seeks a multi-location unit including all of the Roaring River employees along with the employees at the seven other locations of the Employer whom I have found to be agricultural employees. Further, the Petitioner, who for the first time at hearing included the feed mill employees in its petition, has not expressed a desire to represent only the Roaring River employees as a separate single location unit. Accordingly, as to the groups of individuals whom I have found to be agricultural employees, I find that no question affecting commerce exists within the meaning of 9(c)(1) of the Act, concerning the representation of "employees" as defined in Section 2(3) of the Act.

Moreover, as to those classification of employees whom I have concluded to be non-agricultural, and, therefore, subject to the coverage of the Act, I conclude that either the Petitioner has not sought their inclusion in an appropriate unit or as to the Roaring River employees has not expressed its desire to represent them as a single location unit. Therefore, I shall dismiss the petition in its entirety.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-5583

HOLLY FARMS FOOD, INC.

Employer

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 391, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO

Petitioner

ORDER REOPENING CASE AND REOPENING HEARING AND NOTICE OF HEARING

On March 27, 1989, a Decision and Order dismissing the instant petition, was issued by the undersigned on the grounds that certain of the employees sought were agricultural employees and therefore exempt from coverage under the Act and that the Petitioner had not expressed a desire to represent those non-agricultural employees determined to be covered by the Act. As the petition was dismissed, the subject case was closed on March 27, 1989. On our about April 6, 1989, the Petitioner filed a Request for Review wherein it asserted, inter alia, that it wished to proceed to an election in any unit or units the Board may find appropriate. I have

reviewed the Request for Review and decided to treat such Request for Review as a motion for reconsideration, and as the record evidence is insufficient to determine the scope and composition of an appropriate bargaining unit or units of the employees subject to the jurisdiction of the Act, I find the taking of additional evidence is necessary concerning the appropriate bargaining unit or units of the non-argicultural employees of the Employer who the Petitioner seeks to represent by the subject petition. Accordingly,

IT IS HEREBY ORDERED that Case No. 11-RC-5583 be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that the hearing in this matter be reopened for the limited purpose of receiving such further relevant and material evidence in this matter as the parties may present concerning the appropriate bargaining unit or units of those employees of the Employer subject to the jurisdiction of the Act who the Petitioner seeks to represent by its petition herein.

YOU ARE HEREBY NOTIFIED that pursuant to Sections 3(b) and 9(c) of the Act, on the 12th day of May, 1989, at 9:00 a.m., at 437 Federal Building, 251 North Main Street, Winston-Salem, North Carolina, a reopened hearing will be conducted before a hearing officer of the National Labor Relations Board solely upon the aforesaid question of the appropriate bargaining unit or units of employees of the Employer subject to the jurisdiction of the Act, at which time and place the parties will have the right to appear in person or otherwise, and give testimony.

Dated at Winston-Salem, North Carolina, this 28th day of April, 1989.

/s/ Willie L. Clark Jr.
Willie L. Clark Jr.
National Labor Relations Board
Region 11
447 Federal Building
251 North Main Street
Winston-Salem, North Carolina 27101

APPENDIX D

NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-5583

In the Matter of: HOLLY FARMS CORPORATION, EMPLOYER

AND

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

PETITIONER

Pages: 159-309

Place: WINSTON-SALEM, NORTH CAROLINA

Date: MAY 12, 1989

* * *

[173] BY MR. HUDSON:

Q. Mr. Wittington, let's get your full name, please.

A. Samuel Smith Wittington.

Q. Who is your employer?

A. Holly Farms Food.

Q. In what capacity?

A. I'm the live production manager for Wilkesboro.

Q. You testified in the original hearing in this matter?

A. Yes, sir.

Q. Okay. Sam, I'm going to ask you a few questions concerning the live haul crews and the processing plant employees. The employees located in the processing plant. What's, could you repeat, again, what is your duties at Holly Farm? Who are you in charge of overseeing?

A. In a live production manager capacity, I'm over any of the functions up to the processing plant.

Q. And, that includes the live haul crews?

A. Live haul crews, hatcheries, feed mill.

Q. Could you specify the live haul crews?

A. The live haul crews in that department is the people that catch the broiler that is ready to come in to be processed at the processing plant.

Q. And, how many different job descriptions are there within the crew? How many job functions are there?

[174] A. There's three. There's drivers, forklift operators and catchers.

* * *

[178] Q. Okay. Could you describe the dependence that the processing plant has upon the chicken catching crews as far as the job functions are concerned?

A. Well, what we do, the catching process is timed in relation to plant processing in order to keep the birds from sitting in the holding sheds where the birds are going to drift in body weight to between catching time and processing. So, the catchers, what we have them is time for their work schedules in relation to the processing shifts and the catchers work so dictates keeping the processing plant [179] running.

Q. So, the chicken haulers bring the trucks with the chickens into the processing plant?

A. Yes, sir.

Q. And, who unloads the truck?

A. The truck, the trailer is dropped on the scales and a live haul employee then puts a yard bird, a yard shuttle truck, to the trailer and then puts it in the holding shed or either it's taken straight on down to the processing plant at receiving.

Q. And, who operates the shuttle, what are they called?

A. Yard birds what the name on there.

Q. And, who operates those?

A. The one that takes the birds off of the scales is a live haul employee. And, then the birds are put in a holding shed and then the plan processing has employees with yard birds that come up to the scale to pick up the birds and the live haul scale man tells the plant receiving person what trucks to take down in rotation.

Q. So, the live haul scale man communicates with the processing plant employee.

A. Receiving, yes.

Q. Alright. So –

HEARING OFFICER REESE: Mr. Hudson, for clarification purposes as we go through, when you get these categories, if [180] you would specify, have the witness specify how many people we're talking about in any one category.

MR. HUDSON: Okay.

Q. Sam is it true that the catching and delivery of the chickens and delivery to a processing plant, is that the first step in the processing plant operation?

A. Yes.

Q. And, so, the method that you've just described earlier, that's part of the coordination between the two groups?

A. Yes.

Q. And, the operation of the entire system?

A. Uh-huh.

Q. If the chicken catchers were to not deliver the chickens on time or to have a problem, that would affect the entire processing plant?

A. Like I said, we run it close time here between catching and processing to keep the birds from having to sit in a holding shed. So, yes, occasionally if we have, if we get behind or short on labor, truck tears up, there are times when the plant runs out of birds and they have to give the employees a break of ten or fifteen minutes before they get a truck there.

Q. And, if the live haul group didn't work at all, what would happen?

A. Plant wouldn't run. Wouldn't process birds. Now, if [181] they had, if they had carried over birds that were going to be further processed, that had been, you know, brought in the prior day, that department could take a further process. But as far as processing the live birds and that's really where it all originates from.

Q. And, if the plant is not functioning correctly, what is the effect on the live haul operations?

A. It would be the same, same situation. Like, if it comes a snow we have to coordinate between the plant, of course, and live haul as to how many chickens we're going to bring in.

Q. So, it's basically the same operation, all one operation?

A. Yes, it's all one, one, one's dependent on the other one.

Q. Sam, could you clarify for us what would happen with the other operations in the live haul production other than chicken catching crews if, say, the processing plant was to be shut down or closed down? We understand from what you have said earlier that the chicken

catching crews would not be able to work because of the shutdown of the processing plant, but how about the other operations under your, in live production?

A. If the plant was down for a day or two days or a matter of, you know, a week, it wouldn't have any, any influence on the other departments.

Q. And, which departments are those? Could you specify?

A. It would be all the live production. It would be the hatcheries, the feed mill, feed delivery.

[182] Q. The entire live haul production other than the chicken catching crews?

A. That's true.

Q. They would not be affected?

A. Not on short term, no, sir.

Q. Sam, I'm –

MR. HUDSON: You wanted, Mr. Hearing Officer, some numbers regarding the live haul people, the chicken catching crews.

HEARING OFFICER REESE: That's correct. Every job category I need a number for them and I assume they're only located at this one facility. Is that correct?

THE WITNESS: That's correct.

HEARING OFFICER REESE: I need a number of the people there in each category.

MR. HOGG: I got Mr. Wittington's list and gave them to you. Could you temporarily give them back to him, so we can count? What I'll do is go ahead and ask him to give you the numbers of the different groups, so we can save time.

HEARING OFFICER REESE: You mentioned under live haul there were drivers, forklift operators, catchers and I think there are also fuel attendants there at this location. Is that correct?

THE WITNESS: Yes.

HEARING OFFICER REESE: How many drivers are there?

[183] THE WITNESS: There's twenty-seven within one or two.

HEARING OFFICER REESE: And, forklift operators?

THE WITNESS: There's twelve, one for each crew.

HEARING OFFICER REESE: And catchers?

THE WITNESS: There is, there's about a hundred, there's about a hundred and nine to twelve. You have people coming and going.

HEARING OFFICER REESE: And, the fuel attendants?

THE WITNESS: There's two.

HEARING OFFICER REESE: And, you referred to all of these people as live haul employees?

THE WITNESS: Yes, sir.

MR. HOGG: That's a hundred and fifty to a hundred and fifty-two at my count.

HEARING OFFICER REESE: And, those are the only people you referred to as live haul employees?

THE WITNESS: Yes, sir. Now, in that list I think we have two, two cage repairmen along with the.

HEARING OFFICER REESE: That was cage? C-a-g-e? Cage repair?

THE WITNESS: Yes.

HEARING OFFICER REESE: And, they were included in which category? Catchers?

THE WITNESS: Yes, sir. In that count, yes, sir.

HEARING OFFICER REESE: That would be one hundred and nine [184] to one twelve, including the two cage repairmen.

THE WITNESS: Yes.

* * *

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

HOLLY FARMS FOODS, INC.

and Case No. 11-RC-5583

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on March 14, 1989, at Winston-Salem, North Carolina, before a hearing officer of the National Labor Relations Board.

Thereafter, on March 27, 1989, the Regional Director issued a Decision and Order dismissing the petition on the grounds that Petitioner sought to represent certain of the Employer's employees who are exempt from coverage under the Act; that the Employer's "Chicken Catchers" appeared to share a community of interest with employees not sought by Petitioner; and, that Petitioner did not express a desire to represent a single-location unit at the Employer's Roaring River location.

Both parties timely filed Requests for Review of the aforementioned Decision and Order. In its Request for

Review filed on or about April 6, 1989, the Petitioner asserted, inter alia, that it wished to proceed to an election in any unit or units the Board might find appropriate. The undersigned Regional Director treated Petitioner's Request for Review as a motion for reconsideration and on April 28, 1989 issued an Order Reopening Cases and Reopening Hearing And Notice of Hearing.

A reopened hearing was held on May 12, 1989, at Winston-Salem, North Carolina, before a hearing officer of the National Labor Relations Board, for the purpose of taking additional evidence concerning the scope and composition of an appropriate bargaining unit or units of the Employer's non-agricultural employees. Subsequent to the reopened hearing, both parties filed briefs which have been carefully considered.

The Employer is engaged in an integrated poultry business which is administratively divided into divisions. Although the record is silent regarding the number of divisions, it is clear that the Live Production Division administratively controls its hatchery, live haul, feed haul and feed mill operations. Several categories of employees within the Live Production Division are "agricultural" employees exempt from coverage under the Act. The Live Production Division "agricultural" employees include all its hatchery employees, all its live haul employees assigned to its hatcheries, and all of its blood test employees. The Employer's Roaring River, North Carolina, Service Center is administratively controlled by its Fleet Administrative Services Division which also controls three other Service Centers in the Wilkesboro, North Carolina area. There are approximately 198 employees in the first unit and approximately eight employees in the second unit found appropriate herein.

The Petitioner asserts that the Regional Director erred in his March 14, 1989 decision in finding certain of the Employer's employees to be "agricultural" employees exempt from coverage under the Act. It argues that *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967) and *Lindstrom Hatchery and Poultry Farms*, 49 NLRB 776 (1943) cited in the decision are distinguishable from the facts herein. Further, Petitioner states that since North Carolina exempts agricultural employees from mandatory Workers Compensation coverage, the Employer, by providing Workers Compensation coverage for all of its employees, impliedly did not consider certain of its employees to be "agricultural" employees prior to the filing of the Petitioner's petition. The Petitioner also asserts that it is ready to proceed to election in any unit or units which the Board or Regional Director might find appropriate. The Employer contends that the Regional Director erred in not finding that all of the employees sought by Petitioner are "agricultural" employees. The Employer, in the alternative, argues that the only appropriate collective bargaining unit of the non-agricultural employees are: (a) Live Haul (Chicken Catchers) and processing plant or Live Haul alone; (b) Feed Haul; (c) Feed Mill; and (d) all four of the Employer's Service Centers--three of which are not sought by Petitioner. There is no history of collective bargaining among any of the employees at issue.

Upon the entire record in this matter, I find that the hearing officer's rulings at the original hearing and supplemental hearing are free from prejudicial error and such rulings are hereby affirmed. In addition, I find that the Employer is engaged in commerce; that a labor organization's claim to represent certain employees of the Employer and; a question affecting commerce exists

concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Both the Petitioner and Employer are essentially advancing the same arguments, which were made in their respective briefs following the first hearing, regarding the law applicable to the agricultural exemption. The Petitioner's argument regarding Workers Compensation benefits is unconvincing as it merely proves that the Employer is providing a benefit which he might not be mandated to provide. I, therefore, reaffirm my decision of March 27, 1989, finding that the Employer's Hatchery employees, pullet haulers, egg haulers and blood test employees are agricultural employees.

As to the scope and composition of appropriate collective bargaining units containing the remainder of the Employer's employees whom the Petitioner seeks to represent, the record evidence, consisting of the evidence at both the original and reopened hearing, indicates that the Live Haul employees (Chicken Catcher crews), Feed Haul employees, and Feed Mill employees are all part of the Employer's Live Production Division under the supervision of Sam Wittington, the Live Production Manager. The non-agricultural Live Haul employees include 27 truck drivers, 12 forklift operators, and 2 fuel attendants all of whom are divided into 12 chicken catching crews. The chicken catching crews catch, box and transport chickens to the Employer's processing plant in Wilkesboro, North Carolina. The Feed Mill employees include 3 receiving employees, 3 panel operators, 3 pellet mill controllers, 3 cleanup men, 3 vitamin pourers and 6 maintenance and repairmen. They produce the feed which the Employer's 27 Feed Haul drivers transport to the farms where the chickens are raised. All Live Production

division employees share the same fringe benefits and personnel policies. All Live Production division employees are on the same wage system—they all start at the same minimum and their wages are raised usually within 60 to 90 days depending on their job performance. However, there is little or no interchange between the Live Haul, Feed Haul and Feed Mill employees and each department is supervised day-to-day by its own supervisor. Moreover, the record of the second hearing clearly reflects that the Employer's Live Haul employees are not organizationally integrated with its Processing Plant employees and they do not share common supervision up to and including the division level. There is no significant interchange among or between the Employer's Live Haul employees and its Processing Plant employees and they are stationed in different buildings with their own separate restroom, breakroom and recreation room facilities. Furthermore, while the Employer's Live Haul employees are functionally integrated with its Processing Plant employees insofar as they provide chickens for processing, all the Live Division employees share in getting the chickens ready for processing and are thus also functionally integrated with the Processing Plant. The Feed Mill and Feed Haul employees are located in Roaring River, North Carolina, approximately 15 miles from the Live Haul employees' home base in Wilkesboro, North Carolina. According to the record, the Employer's Roaring River, North Caroline Service Center, which is a part of the Employer's Fleet Administrative Services Division, includes 6 mechanics and 2 parts men. The Service Center employees are stationed in their own separate building at the Employer's Roaring River location. The Roaring River Service Center employees are organizationally distinct from the Live Production Division employees. The Service Center employees share the same personnel

policies and fringe benefits as do all of the Employer's employees. However, unlike the Employer's Live Production Division employees, the Roaring River Service Center mechanics do not start at a minimum (or basic) entry level. Rather, a mechanic's starting wage is based upon his individual qualifications. The Roaring River Service Center employees have no interchange with the Live Production Division employees and do not have any common supervision with them. Therefore, I find that the Employer's Roaring River Service Center employees do not share a community of interest with its Live Production Division employees. The record also reflects that the Roaring River Service Center employees have little or no interchange with their counterparts at the Employer's other Service Centers. The Roaring River Service Center employees are locally hired. The Employer's Service Centers, while able to service all of the Employer's fleet, are all intended to specialize in specific vehicles within the Employer's fleet. The Roaring River Service Center is primarily dedicated to maintaining and repairing Live Production Division vehicles. The Roaring River Service Center employees wear uniforms the color of which they chose as the unit color. The employees at the other Service Centers choose their own respective uniform colors.

In representation cases, the Board gives consideration to the unit sought by a petitioner. See *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006 (1962). Further, the Board consistently determines whether the petitioned-for unit can be considered appropriate for purposes of collective bargaining rather than whether the petitioned-for unit constitutes the most appropriate unit. See *The Trustees of Columbia University in the City of New York*, 222 NLRB 309 (1976). Moreover, the Board, considers whether a labor organization seeks to represent the employees on a comprehensive basis. See *Hegins Corporation*, 255 NLRB 1236 (1981); *Purnell's Pride, Inc.*, 252 NLRB 110 (1980); *Beckett Aviation Corporation—Cleveland*, 254 NLRB 88 (1981); *Penn Color, Inc.*, 249 NLRB 1117 (1980); *Renzetti's Market, Inc.*, 238 NLRB 174 (1978).

The Petitioner herein seeks a unit comprised of all of the Employer's Live Production Division employees and the Employer's Roaring River Service Center employees. Petitioner is thus impliedly seeking the broadest appropriate unit or units within the Employer's Live Production Division which the Board might find appropriate. Further, the Petitioner does not seek to represent the Employer's Processing Plant employees who, as the complete record reflects, do not share a sufficient community of interest with its Live Haul employees to make them inseparable for collective bargaining purposes. Therefore, giving proper consideration to Petitioner's request and the fact that the Employer's Live Production Division employees share the same overall supervision, wage policies, personnel policies and fringe benefits, in addition to their functional integration, I find that the Live Production Division employees share a sufficient community of interest to constitute an appropriate unit for collective bargaining purposes. Further, I find that the Employer's Roaring River, North Carolina Service Center employees share a community of interest because they share the same day-to-day supervision; they are geographically separate from the other Service Centers; and, they have established a group identity through their choice of the color of their uniforms. Further, I find that the Employer has not overcome the presumptive appropriateness of the Roaring River Service Center

as a single-location unit. In this connection, the record does not show that the interest of the Roaring River Service Center employees have merged with those of its other service centers. See *Beckett Aviation Corp.*, 254 NLRB 88 (1981); *Renzetti's Market, Inc.*, 238 NLRB 174 (1978). Thus, while a unit consisting of all Service Centers may also be appropriate, I am convinced on the record herein that such a unit is not the only appropriate unit.

In light of the above and the record as a whole, I find that the following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT A

All of the Employer's Live Haul (Chicken Catching crews) employees at the Employer's facility in Wilkesboro, North Carolina, and the Employer's Feed Haul, and Feed Mill employees at the Employer's facility in Roaring River, North Carolina, excluding all office employees, guards and supervisors as defined in the Act.

UNIT B

All of the employees of the Employer at its Service Center in Roaring River, North Carolina, excluding all office employees, guards and supervisors as defined in the Act.

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during

that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list, containing the names and addresses of all eligible voters, must be filed with the Regional Director within seven (7) days from the date of this Supplemental Decision and Direction of Election. The names on the list should be in alphabetical order. No

extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW, Washington, DC 20570. This request must be received by the Board in Washington before July 5, 1989.

Dated at Winston-Salem, North Carolina, this 20th day of June, 1989.

/s/ Willie L. Clark, Jr.
WILLIE L. CLARK, Regional Director
National Labor Relations Board
Region 11
447 Federal Building
251 North Main Street
Winston-Salem, North Carolina 27101-3986

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOLLY FARMS FOOD, INC.
Employer

and Case 11-RC-5583

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL NO. 391, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO
Petitioner

DECISION ON REVIEW AND ORDER

Petitioner's Request for Review of the Regional Director's Supplemental Decision and Direction of Election is granted solely with regard to the Regional Director's conclusion that the Employer's Roaring River Service Center employees do not share a sufficient community of interest with the remaining petitioned-for employees to be included in a single unit. In all other respects, Petitiner's and Employer's Requests for Review are denied. Employer's application for stay of election also is denied. In denying review of the Regional Director's findings that the Employer's egg haulers, pullet haulers, and blood testers are agricultural employees as defined in Section 2(3) of the Act and Section 3(f) of the Fair Labor Standards Act, the Board finds that those workers are agricultural laborers under the secondary definition of agriculture set forth in Section 3(f). See *Bayside Enterprises v.*

NLRB, 429 U.S. 298 (1977); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949).

Based on the Regional Director's findings, the relevant portions of which are uncontradicted, we find that the petitioned-for unit combining the Employer's Roaring River Service Center employees with its live haul, feed haul, and feed mill employees is an appropriate unit for bargaining. The factors cited by the Regional Director indicating that a separate unit of service center employees might be appropriate, such as separate supervision and wage systems, and the absence of interchange between employee groups, do not establish that those employees lack a sufficient community of interest to be included in a single unit with the Employer's other employees. Service center employees are subject to the same personnel policies and receive the same fringe benefits as other employees. Further, employees at the Roaring River Service Center maintain and repair the vehicles used by other unit employees, thus demonstrating functional integration. We find that these factors, which are not disputed, establish that employees at the Roaring River Service Center share a sufficient community of interest with the remaining employees in the petitioned-for unit to warrant both groups' inclusion in a single bargaining unit.

Accordingly, the Regional Director's finding that the requested overall unit of live haul, feed haul, feed mill, and Roaring River Service Center employees is not appropriate is reversed. The case is remanded to the Regional Director for further appropriate action, including rescheduling the election and the posting of revised Notices of Election.

JAMES M. STEPHENS, CHAIRMAN
MARY MILLER CRACRAFT, MEMBER
DENNIS M. DEVANEY, MEMBER

Dated, Washington, D.C., July 20, 1989.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 95-210

Holly Farms Corporation, et al.,
Petitioners

v.

National Labor Relations Board, et al.

ORDER ALLOWING CERTIORARI.
Filed November 6, 1995.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted limited to Question 5 presented by the petition.

November 6, 1995

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

(9)

No. 95-210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Petitioners' chicken catchers, forklift drivers, and live haul drivers, who go to farms of independent growers, where they catch, cage, and load live chickens owned by Petitioners and deliver them to Petitioners' processing plant, are agricultural laborers within the meaning of 29 U.S.C. §§152(3) and 203(f) and therefore exempt from the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.*

*Tyson Foods, Inc., is involved in a joint venture and/or partnership with Trasgo, S.A. DE C.V.; Offshore Systems, Inc.; Aleutian Fuel Services; Ucluelet Seafood Processors; Universal Plan Investments; and Shanghai Ocean Wealth Products Corporation. Tyson Foods, Inc., was the parent company of Holly Farms, Inc. There are no other parent companies or non-wholly-owned subsidiaries.

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No. 95-210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 48 F.3d 1360 (4th Cir. 1994). (Pet. App. 1).[1] The order of the National Labor

[1] References to the Joint Appendix are designated as "App." followed by the appropriate page number(s). References to the [footnote continued]

Relations Board is reported at 311 N.L.R.B. 273 (1993). (Pet. App. 79).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 10, 1995. The court of appeals entered an order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing in Banc on May 9, 1995. Petitioners' Petition for Writ of Certiorari was filed on August 7, 1995. (App. 2a). The Court granted the petition, limited to question number five, on November 6, 1995. (App. 46a). The Court has jurisdiction under 28 U.S.C. §1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

This case involves consideration of Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §152(3) (1973), and section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §203(f) (1978).

Section 2(3) of the NLRA, 29 U.S.C. §152(3), provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in the connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employer by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 3(f) of the FLSA, 29 U.S.C. §203(f), defines "agriculture" as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

STATEMENT OF THE CASE

For many years, Petitioner Holly Farms Corporation ("Holly") has been engaged in the production and marketing of poultry products at various facilities throughout the United States, including Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas.[2] Its operations have included hatcheries, live haul operations,

Appendix to the Petition for Writ of Certiorari are designated as "Pet. App" followed by the appropriate page number(s).

[2]The stock of Holly was purchased by Petitioner Tyson Foods, Incorporated ("Tyson") on July 18, 1989. (Pet. App. 94).

feed mills, feed haul operations, maintenance facilities, processing plants, and transportation operations. (Pet. App. 227-229).

Holly is a vertically integrated poultry company. The process starts with female breeder hens referred to as pullets. Approximately eighty percent of the pullets are purchased from breeder companies. The remainder are produced by Holly. The baby pullets (one to two days old) are transported to the farms of independent growers who are under contract with Holly to raise the pullets. The baby pullets are unloaded at the farms by pullet service employees of Holly. The pullets are then grown by the independent grower to the age of twenty weeks. (App. 7a-9a).

Once the pullets reach the age of twenty weeks, they are caught and loaded on trucks and transported to laying houses by employees of Holly called pullet movers. The laying houses are owned by independent farmers. The pullets lay eggs, which are collected and placed into cartons by the independent farmer. The eggs are loaded on trucks and delivered to Holly's hatcheries by employees of Holly called egg haulers. Holly's hatchery employees place the eggs into setters, where the eggs are kept warm for a period of eighteen days. Holly's hatchery employees then take the eggs from the setters to incubators, where they are hatched. Once the eggs are hatched, the chicks are removed from the incubators, placed on conveyor belts, and carried to work stations at which the chicks are debeaked and vaccinated by employees of Holly. (App. 9a-12a).

On the same day that they are hatched, the broiler chicks are delivered by Holly employees ("chick delivery" employees) to the farms of independent farmers who are under contract with Holly to raise the chicks.

The broiler chicks are grown by the independent farmers until they reach the age of forty-nine days. When the chicks reach the age of forty-nine days, Holly's live haul crews go to the farms. These crews consist of a supervisor, nine chicken catchers, one forklift driver, and one live haul driver. The catchers manually catch the chickens and place them in cages. The caged chickens are loaded on the live haul trucks by the forklift operator. When the truck is full, the live haul driver delivers the chickens to the processing plant and then returns to the farm for additional loads. At the end of the shift, the live haul driver transports the live haul crew to Holly's processing plant. (App. 4a-5a, 12a-14a; Pet. App. 230-231 n.54).

When the live haul trucks reach the processing plant, the trailers on which the caged chickens have been loaded are attached to a "yard shuttle truck" by a Holly employee, who then transports the trailer either to a holding shed or to the processing plant receiving department. (App. 28a-29a). The chickens are subsequently processed and marketed.

Holly also operates a feed mill where it manufactures poultry feed. The feed is delivered by Holly's feed haul drivers to the independent broiler growing farms. The independent grower, however, actually does the feeding of the chicks. (App. 4a, 6a-7a).

On February 16, 1989, Chauffeurs, Teamsters and Helpers, Local Union Nos. 29, 71, 355, 391, 592, 657, and 988 (hereinafter collectively "the Union") filed a representation petition with the National Labor Relations Board ("NLRB" or "Board") seeking to represent "a unit comprised of all hatchery, live haul and feed haul employees . . . at [Holly's] Wilkesboro, North Wilkesboro, Hayes, Roaring River, Seacrest, Suncrest,

and Fairplanes, North Carolina facilities." (App. 19a). Pursuant to Section 9(a) of the Act, 29 U.S.C. §159(a), a hearing was held to determine the scope of the appropriate bargaining unit.

Over the objection of Holly that the live haul employees were agricultural employees not covered by the NLRA, the Board directed an election in the following bargaining unit:[8]

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina and feed haul, feed mill and service center employees employed at the facility of the Respondents located in Roaring River, North Carolina, excluding all office employees, guards and supervisors as defined in the Act.

(App. 40a, 44a).

On July 27, 1989 an election was held in which the Union failed to receive a majority of the valid votes cast. The Union filed unfair labor practice charges with the Board alleging that Holly committed numerous violations of the NLRA during the Union's organizing activities. The Board's General Counsel issued an unfair labor practice complaint against Holly. The General Counsel alleged that Holly's unfair labor practices were so serious that the possibility of a fair rerun election was remote and requested that a bargaining order under the Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), be issued on the basis of signed authorization cards.

---

[8]The Board agreed with Holly that Holly's hatchery employees, including egg haulers and pullet haulers, were exempt agricultural laborers. (App. 21a-22a, 43a).

The NLRB acquired jurisdiction under Sections 10(a) and (b) of the NLRA, 29 U.S.C. §§160(a) and (b). A hearing was held before Administrative Law Judge Robert M. Schwartzbart ("ALJ") beginning on November 27, 1989, and concluding on May 2, 1990. (App. 1a-2a).

The ALJ issued his decision on March 12, 1992. He concluded that Holly had engaged in a number of unfair labor practices during the organizational drive at the Wilkesboro facility, that Holly's unfair labor practices had made the possibility of a fair rerun election unlikely, and that a *Gissel* bargaining order should issue in the bargaining unit previously approved by the Board. (Pet. App. 785-817).

Holly filed timely exceptions to the ALJ's decision with the NLRB. On May 28, 1993, the Board issued its decision and order. The Board affirmed the ALJ's conclusions, in pertinent part, and specifically approved of the issuance of a *Gissel* bargaining order. (Pet. App. 147-156). The Board declined to reconsider the bargaining unit found appropriate in the prior representation hearing. (Pet. App. 83). Board Member Oviatt dissented from this part of the decision on the ground that Holly's live haul crews were agricultural employees excluded from the Act's coverage. Member Oviatt would have dismissed all allegations of the complaint that alleged violations with respect to the live haul workers. (Pet. App. 187-191).

On June 7, 1993, Petitioners timely filed a Petition for Review with the United States Court of Appeals for the Fourth Circuit. On July 19, 1993, the Board filed a Cross-Application for Enforcement of its Order. The court of appeals acquired jurisdiction pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. §§160(e) & (f).

On March 10, 1995, a panel of the court of appeals enforced the Board's order. Judge Niemeyer dissented in pertinent part because in his opinion, the chicken catchers, forklift drivers, and live haul drivers were agricultural employees exempt from coverage by Section 2(3) of the NLRA. (Pet. App. 38-61). The Court granted certiorari to resolve this issue. (App. 46a).

SUMMARY OF ARGUMENT

This case presents the single issue of whether the NLRB, as affirmed by the panel of the court of appeals, acted reasonably in holding that Holly's chicken catchers, forklift drivers, and live haul drivers were employees under §2(3) of the NLRA, rather than exempt agricultural laborers. Petitioners contend that the Board's conclusion is contrary to express statutory language, clear congressional intent, interpretations of the Secretary of Labor, and prior interpretations by the Court of the pertinent statutory language. Accordingly, the Board's conclusion is not entitled to deference and should be rejected. *E.g., Lechmere, Inc. v. NLRB,* 502 U.S. 527, 537 (1992); *Dole v. United Steelworkers of America,* 494 U.S. 26, 42 (1990); *Board of Governors of the Federal Reserve Sys. v. Dimension Fin. Corp.,* 474 U.S. 361, 368 (1986); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-843 (1984); *American Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 318 (1965). Rejection of the Board's conclusion that the live haul employees are not exempt agricultural laborers mandates the rejection of all unfair labor practices directed at live haul employees, as well as the *Gissel* bargaining order.

Section 2(3) of the NLRA, specifically exempts "any individual employed as an agricultural laborer" from

the statutory definition of "employee." Since 1946, in riders to the Board's appropriation acts, Congress has directed the Board to look to §3(f) of the FLSA, in determining whether an individual is an agricultural laborer.

The plain language of §3(f) defines the term agriculture to include raising poultry, harvesting agricultural commodities, and engaging in any practices by a farmer or on a farm that are incidental to or in conjunction with the farming operations of the farmer or the farm. Rather than give this language its natural meaning, the Board has, by administrative fiat, interpreted §3(f) in a manner which excludes the activities of all nonfarmers, no matter how related the activities are to agriculture.

The Board's interpretation ignores the express language of §3(f), which provides that agriculture includes "harvesting" of "agricultural commodities" and that "preparation for market" and "delivery to storage or market" are practices that are incidental to farming practices. The Board's interpretation ignores extensive contemporaneous legislative history demonstrating that independent businesses, which perform farming practices on farms, are within the agricultural exemption. The Board's interpretation ignores interpretations of the Secretary of Labor defining the practices of catching, caging, and loading live chickens as practices incidental to raising poultry. Finally, the Board's interpretation ignores decisions of the Court holding that integrated processors of agricultural products who perform activities on a farm that are related to the farm's farming operations are covered by the exemption, despite their motivation to benefit their nonagricultural profit-seeking enterprises. *Maneja v. Waialua Agric. Co.,* 349 U.S. 254, 261-263 (1955); *see Bayside Enters., Inc. v. NLRB,* 429 U.S. 298, 303

n.13 (1977) (discussing interpretative bulletin of Wage and Hour Division of Department of Labor).

Holly's chicken catchers and forklift drivers concededly work on the farms of the independent growers. They catch and cage the chickens and load them on trucks for delivery to market. These functions constitute the harvesting of an agricultural commodity (poultry) and fall within the definition of primary agriculture. 29 C.F.R. §§780.112, 780-118(b) (1994). They also constitute preparation for market. 29 C.F.R. §780.-151(k). Even, assuming, *arguendo*, that the Board is correct that Holly is not acting as a farmer in catching and caging its own chickens, the chicken catchers and forklift drivers are clearly engaged either in primary agriculture or in secondary agriculture as an incident to farming operations. The chickens must be caught before they can be shipped to market.

Although the live haul drivers perform the majority of their work on the roads, they are engaged in delivery to market, a specific secondary agricultural function. They also transport the catchers and forklift operators to and from the farms. These activities are also within the definition of secondary agriculture. *Maneja*, 349 U.S. at 261-262.

The activities of the live haul drivers are incidental to Holly's farming practices. The Board concedes that Holly is a farmer when it breeds poultry and hatches eggs to produce broiler chicks. Although Holly ceases to be a farmer while the chickens are being raised by the independent grower, title to the chickens remains with Holly at all times. When Holly goes on the farms and regains possession of the chickens by catching, caging, loading, and delivering them to market, Holly resumes

its status as a farmer. The Board's adoption of an invariable rule to the contrary eliminates the "delivery to market" exemption for farmers who contract out part of the intermediate raising process, even though the farmer does his own preparation for and delivery to market. The Board's conclusion is contrary to the language of the statute and clear congressional intent.

Holly's chicken catchers, forklift drivers, and live haul drivers satisfy the plain language of §3(f). Petitioners request that the Court reverse the judgment of the court of appeals finding that these employees are not agricultural laborers exempt from coverage of the NLRA.

ARGUMENT

I.

BECAUSE THE BOARD'S INTERPRETATION OF SECTION 3(f) OF THE FLSA IS CONTRARY TO THE PLAIN LANGUAGE OF THAT SECTION, CLEAR CONGRESSIONAL INTENT, THE COURT'S PRIOR INTERPRETATIONS OF THAT SECTION, AND THE SECRETARY OF LABOR'S INTERPRETATIONS OF THAT SECTION, IT IS NOT ENTITLED TO DEFERENCE.

Section 2(3) of the NLRA defines the term "employee" broadly to include "any employee", subject to certain specific exceptions. Because the term "employee" was not given any specific definition by Congress, except by way of limitation, the Court has, over the years, deferred to the Board's development of the parameters of this term. *NLRB v. Town & Country Elec., Inc.*, 64 U.S.L.W. 4022 (U.S. Nov. 28, 1995) (paid union organizers can be employees); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (undocumented aliens can be employees); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (certain confidential employees are employees); *Packard Motor Car Co. v. NLRB*, 330 U.S.

485 (1947) (company foremen are employees); *NLRB v. Hearst Publications Inc.*, 322 U.S. 111 (1944) (independent newsboys are employees); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (job applicants are employees).

Where, however, as here, a specific exception to the §2(3) definition of employee is involved, the Board is not free to disregard or whittle away at the exception. Thus, when Congress overruled the *Packard* and *Hearst* decision by amending §2(3) to exclude supervisors and independent contractors, the Board was bound to follow these exceptions. Similarly, the Board has no discretion to ignore Congress' intent to exclude "any individual employed as an agricultural laborer" from the NLRA definition of employee. Nor is the Board free to impose its own definition of an "agricultural laborer." Rather, "[a]nnually since 1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of 'agricultural laborer' in §2(3) of the NLRA to §3(f) of the FLSA." *Bayside*, 429 U.S. at 300 n.6. The NLRB has no special expertise or authority in interpreting the FLSA. Instead it is the Secretary of Labor who is charged with interpreting the FLSA.

While the Board is free to choose between conflicting reasonable interpretations of this statutory definition, *Bayside*, 429 U.S. at 302, it is not free to disregard the clearly expressed intent of Congress. *E.g., United Steelworkers of America*, 494 U.S. at 42 ("Because we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation"); *Dimension Fin. Corp.*, 474 U.S. at 368 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Con-

gress"); *Chevron*, 467 U.S. at 842-843 ("If the intent of Congress is clear, that is the end of the matter"); *American Ship Bldg. Co.*, 380 U.S. at 318 ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial intertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress"). Moreover, once the Court determines the clear meaning of a statute, the principle of *stare decisis* applies and the agency must act consistently with that interpretation. *Lechmere*, 502 U.S. at 537.

The Board, in the decision under review, as well as other decisions interpreting the scope of the agricultural exemption, has blatantly ignored the plain language of the §3(f) definition of "agriculture," the Court's interpretations of that section, the Secretary of Labor's interpretation of that section, and clearly stated congressional intent to exempt the whole field of agriculture, including all practices by a farmer or on a farm as an incident to or in conjunction with such farming practices. The Board's conclusion that Holly's chicken catchers, forklift drivers, and live-haul drivers are not agricultural laborers is not entitled to deference.

II.
CONGRESS EXEMPTED THE WHOLE FIELD OF AGRICULTURE INCLUDING ALL PRACTICES BY A FARMER OR ON A FARM AS AN INCIDENT TO OR IN CONJUNCTION WITH SUCH FARMING PRACTICES.

The intent of Congress in enacting the agricultural exemption is not subject to speculation. It is clearly defined in the language of §3(f) and in the contemporaneous legislative history of §3(f). *See Farmers Reservoir Co. v. McComb*, 337 U.S. 755, 765 (1949). "The exemption was meant to embrace the whole field of

agriculture," and its coverage is "coterminous with the sum of those activities necessary in the cultivation of crops, their harvesting, and their 'preparation for market, delivery to storage or to market or to carriers for transportation to market.' " *Maneja*, 394 U.S. at 260.

The word "agriculture" has two meanings. The primary meaning consists of "farming in all its branches", including, *inter alia*, the raising of poultry and the harvesting of agricultural commodities. The secondary meaning "includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Farmers Reservoir*, 337 U.S. at 762-763.

Thus, under the express language of §3(f), an individual will be deemed an agricultural laborer if he falls within any one of the following categories:

(1) He performs primary farming activities;

(2) He performs work on a farm as an incident to or in conjunction with the farming operations of the farm; or

(3) He is employed by a farmer and he performs practices incidental to or in conjunction with his employer's farming operations.

If the individual falls within either category 1 or 2, it is irrelevant whether or not his employer is a farmer. He is considered an agricultural employee because of the nature of his work. Only if the individual does not fall within either category 1 or 2 does the status of his employer become important.

If it were not clear from the language of the statute itself, the contemporaneous legislative history removes all doubt that Congress intended that the definition of an

agricultural laborer would include nonfarmers so long as their work involved primary farming activities or occurred on a farm and was incidental to the farming operations of the farm. During the Senate discussions of the FLSA, Senator Black described the scope of the agricultural exemption as follows:

> The bill specifically and unequivocally excludes certain industries and certain types of business from its scope and effect. It specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.
>
> We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture.

81 Cong. Rec. 7648 (1937).

Despite the comprehensiveness of the agricultural exemption, Senator Tydings became concerned that an unintended "loophole" had been left in the proposed bill, which at that time limited the secondary farming exemption to " 'any practices ordinarily performed by a farmer as an incident to such farming operations.' " 81 Cong. Rec. 7653 (citation omitted). Thus Senator Tydings posed the following scenario:

> What I am thinking of is that quite often the threshing crew is not a part of the farmer's organization. There are men who make a business of going around with threshing and baling machines with enough help to come upon a farm and make a contract with the farmer to thresh his wheat. I should like to know if in such a case it is the Senator's opinion that the threshing crew would be

> exempt, or whether they would be under the operation of the hours provision of the bill.

Id. Senator Tydings explained that it was his understanding that "farming in all its operations, from the time the grain is put into the ground until it leaves the farm, is to be exempted from the provisions of the measure." Senator Tydings expressed concern that the independent wheat thresher would not be exempt. Senator Borah responded that he believed the threshers hypothesized by Senator Tydings would be exempt and pointed out that "[w]heat is not worth very much unless it is threshed." *Id.*

The debates focused on various examples posed by Senators. Senator Overton questioned Senator Black regarding cotton. The following colloquy occurred:

> MR. OVERTON: I assume after the cotton is matured and is being picked the picking would be considered part of an agricultural pursuit, would it not?
>
> MR. BLACK. Certainly, it would be so considered.
>
> MR. OVERTON. I am going just one step further. After the cotton is picked it has to be ginned. Suppose a farmer has a gin on his own farm and gins his own cotton – not the cotton of others – is that a process in the agricultural handling of cotton?
>
> MR. BLACK. As defined by this bill, yes; unquestionably.

81 Cong. Rec. 7657. Senator Black used an example of a farmer erecting a shirt manufacturing operation on his farm as an example of an operation that would not be incidental to agriculture. 81 Cong. Rec. 7658.

Subsequently, the issue raised by Senator Tydings regarding the independent wheat thresher came up again. Senator Bone espoused a position opposite to that taken by Senators Tydings and Borah:

> [I]f a man operates a threshing outfit, and goes from one farm to another farm, such a man is an independent contractor. He is not a farmer. That is not an operation incident to farming, because the man is engaging in a cold-blooded business operation, going from one farm to another, precisely as a huckster goes around and sells tinware to farmers.
>
> . . . . He does not own a farm. He has not any connection with it except to take his threshing apparatus there and thresh the wheat and then get off the land.

81 Cong. Rec. 7569.

In order to clarify this issue, Senator McGill proposed an amendment to add the words "or on a farm" after the word "farmer," as well as the phrase "including delivery to market" after the word "operations." 81 Cong. Rec. 7888. Senator McGill explained the purpose of the amendment as follows:

> [T]he purpose of the amendment is to broaden the definition of "employee" as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing machine outfit and employs a crew and is employed by a farmer to thrash his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included.

Id.

Senator McGill was then questioned by Senator George as follows:

MR. GEORGE. Is it the purpose of the amendment to exempt those who thresh grain?

MR. McGILL. Those who thresh grain, who harvest grain and deliver it to market.

MR. GEORGE. Would the amendment also apply to the harvesting of any other crop?

MR. McGILL. It would apply to any commodity produced on a farm.

MR. GEORGE. Would it apply to peanut pickers who pick in the fields?

MR. McGILL. Yes.

MR. GEORGE. And who move peanuts to the market?

MR. McGILL. Yes; that is my understanding.

MR. GEORGE. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

MR. BLACK. That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

MR. GEORGE. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is

threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

MR. BLACK. Unquestionably.

MR. McGILL. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.

MR. GEORGE. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?

MR. McGILL. That is true; and the language would also include all labor performed in making delivery to market.

81 Cong. Rec. 7888. The amendment was approved and was included in the final version of the bill.

There can be no doubt that had the question been posed to Senator McGill as to whether the amendment would include the catching, caging, and loading of live chickens, his answer would have been "yes." Such activities are indistinguishable from picking cotton, picking peanuts, and threshing wheat. They are "necessarily preparatory to the marketing" of the agricultural product.

III.

HOLLY'S CHICKEN CATCHERS AND FORKLIFT DRIVERS PERFORM ESSENTIAL AGRICULTURAL FUNCTIONS ON FARMS AND ARE CLEARLY AGRICULTURAL LABORERS.

In concluding that Holly's live haul crews were not agricultural laborers, the Board relied solely on its view "that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks." (App. 22a). Accepting for the moment the Board's position that Holly is not acting as a farmer when it sends its live haul crews to the farm,[4] the Board's decision does not even purport to address the "or on a farm" language of §3(f). "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." *Reiter v. Sonotone Corp.*, 442 U.S. 329, 339 (1979). Congress added the phrase "or on a farm" to §3(f) specifically for the purpose of exempting a nonfarmer who was performing work on a farm incidental to the farming operations of that farm. *Farmers Reservoir*, 337 U.S. at 767. Nor did the Board consider whether the chicken catchers and forklift drivers are engaged in primary agriculture. "If an employee is employed in [primary agricultural activities], he is engaged in agriculture regardless of whether

[4] Although the Court has approved this conclusion as it applies to feed mill drivers who deliver poultry feed to the independent growers' farms, *Bayside* 429 U.S. at 303-304, it does not apply once Holly begins catching and cooping the chickens that it initially raised before turning them over to the independent grower for the maturation process. As is discussed at Section IV B of this brief, Holly does function as a farmer in catching, caging, loading and delivering its own chickens to market.

he is employed by a farmer or on a farm." 29 C.F.R. §780.105(b). Clearly, even assuming, *arguendo*, that Holly is not acting as a farmer at the time that it catches and cages the chickens, that is not dispositive.

A. The Chicken Catchers And Forklift Drivers Perform Work On A Farm As An Incident To Or In Conjunction With Farming Operations.

Because the work of the chicken catchers and forklift drivers is performed on the farms of the independent growers, these individuals are exempt agricultural laborers if their work is performed "as an incident to or in conjunction with" the farming operations of the independent grower. Although the Board did not address this issue in the decision under review, it states in its Brief in Opposition to the Petition for Certiorari that "the activities of the live haul workers are incidental, not to the operations of the independent growers, but instead to petitioners' poultry slaughtering operation." (Brief at 23). This rationale has been followed by the Board in other decisions both prior and subsequent to the decision under review.

In *Imco Poultry, Division of International Multifoods Corp*, 202 N.L.R.B. 259, 260-261 (1973), the Board stated:

> As the service crew employees involved herein are engaged in handling and transporting chicks on the farms of independent growers only after Respondent's farming operations have ended, these employees cannot be performing practices incident to, or in conjunction with, Respondent's farming operations. More accurately, they are engaged in nonfarming operations which are incident to, or in conjunction with, a separate and distinct business

> activity of the Respondent, i.e., shipping and marketing. Furthermore, since the activities of the employees named herein on the growers' farms are all related to transportation and the employees have no business relationship with the independent farmers, we conclude that the employees' activities were not incidental to the independent farmers' poultry raising operations.

In *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992) the Board held that the employer's "chicken catchers are engaged in activity incidental to a separate and nonfarming business activity of the Employer, and thus do not fall within the agricultural labor exemption contained in Section 2(3) of the National Labor Relations Act, 29 U.S.C. §152(3)." Relying on *Imco Poultry*, the Board asserted that at the time that the chicken catchers begin their work on the farms of the independent growers, the poultry raising activities of both their employer and the independent grower have "concluded." 307 N.L.R.B. at 1440.

The Board's position that the activities of catching and caging live chickens on the farms of the independent growers are not incidental to the farming operations of either Holly or the independent growers is irrational, contrary to clearly expressed congressional intent, and contrary to precedents of the Court and the Secretary of Labor. The Board concedes that Holly is a farmer engaged in the primary agricultural function of raising poultry up until such time as it sends the chicks to the farms of the independent growers. Thus, the Board found that Holly's hatchery employees, egg haulers, and pullet haulers are agricultural employees (App. 21a-22a, 43a). The Board apparently further concedes that the activities of the independent grower in feeding, caring for, and raising the chickens are primary agricultural

tasks. Nevertheless, according to the Board, the activities of catching, caging, and loading the chickens are not incidental to the poultry raising operations of either Holly or the independent growers.

Catching, caging, and loading live chickens that have been raised first by Holly and subsequently by the independent growers are tasks that are clearly incidental to, or in conjunction with, someone's (Holly or the independent grower) poultry raising operations. The catching, caging, and loading process does not involve any changes to the natural state of the chickens. The only purpose of these functions is to enable the chickens to be delivered to market. If the chickens are not caught, they will presumably remain on the farm until such time as they die either as a result of accident, malnutrition, or old age. Even the small farmer who raises chickens for his own table must catch his chickens before he can eat them.

The language of §3(f) expressly includes "preparation for market" as an activity that is incidental to the farm's farming operations. Moreover, the Secretary of Labor has interpreted "preparation for market" as including "culling, grading, cooping, and loading" of poultry. 29 C.F.R. §780.151(k).

The Board's position that Holly is acting as an incident to its processing operations in sending out its live haul crews to the farms, even if true, is irrelevant. Nowhere in the language of the exemption, or in the legislative history, is there any suggestion that the activity being performed on a farm must be "solely" or "exclusively" incidental to the farming operations of the farm. An activity may be incidental to a multitude of other operations. The independent wheat thresher cited in the legislative history is obviously acting as an incident to

his own business operations, as well as the farming operations of the farmer. The Board's strained interpretation of what is incident to farming operations effectively renders the "on a farm" language in §3(f) meaningless. Under the Board's view, if the independent grower does his own catching, caging, and loading of chickens, he is exempt as a farmer.[5] However, if anyone else performs these activities, he is not exempt because he is acting in the interest of some other business interest. The independent wheat thresher, peanut picker, and cotton picker are not exempt inasmuch as their motivation is to advance their own business interests. Yet, the Court has clearly observed that "the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm." *Farmers Reservoir,* 337 U.S. at 767.

Recognizing the untenability of this position, the Board asserts in its Brief in Opposition that the "on a farm" exemption is limited to independent business enterprises that do nothing but thresh wheat, pick peanuts, pick cotton, etc. (Brief at 24). According to the Board, if the independent business enterprise has any other business operations the exemption does not apply. In support of this proposition, the Board cites to *Farmers Reservoir,* 337 U.S. at 767, where the Court stated:

> On the floor of the Senate it was objected that [the original language of §3(f)] would exclude the threshing of wheat or other functions necessary to

[5] *See Domsea Farms, Inc.,* 211 N.L.R.B. 832 (1974) (employees of commercial fish farm who "harvest" coho salmon "by killing them in freezing water, putting them in tubs, and transferring them to an outside contractor's processing plant for dressing, packaging, and distribution for market" are agricultural laborers).

> the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. (Footnote omitted).

Petitioner is unaware of any Board decision in which this rationale has ever been stated. Thus, it cannot be used to justify the Board's decision. Moreover, there is no indication in the legislative history that Congress' discussion of a company that went from farm to farm threshing wheat was intended to limit the exemption to independent companies that did nothing else, anymore than it was intended to limit the exemption to wheat threshers. The examples used by the Senators were intended to illustrate, not limit, the exemption. The Court's use of the word "solely" in *Farmers Reservoir* appears intended to highlight the fact that even if the independent company had no farming operations whatsoever and was organized as a purely separate business enterprise, its employees would nevertheless be exempt if they performed functions on the farmer's farm that were necessary to the farmer. Indeed, in *Bayside,* the Court recognized that "[a]n employer's business may include both agricultural and nonagricultural activities." 429 U.S. at 301. The interpretation of the Board's counsel represents nothing more than an attempt to usurp major policy decisions more properly made by Congress.

The Board's narrow view of the phrase "as an incident to or in conjunction with such farming operations" focuses on the ultimate motivation of the Company to market processed chicken at a profit, a wholly irrelevant consideration[6], and is inconsistent with the Court's

[6] This is the same motivation behind Holly's hatchery operations. These operations have no independent purpose other than

[footnote continued]

decision in *Maneja,* where the Court addressed the agricultural status of employees of a "corporation, which is engaged in the growing, harvesting and processing of sugar cane" at its ten thousand acre plantation. The Court described the employer's operations as "the agricultural analogue of the modern industrial assembly line." 349 U.S. at 256. The company planted, grew, cultivated and harvested sugar cane. It loaded the sugar cane on railroad cars and transported the freshly cut sugar cane over portable tracks to the processing plant, where it processed the sugar cane into raw sugar and molasses. It then stored the sugar and molasses in warehouses on the plantation and subsequently shipped the sugar and molasses throughout the United States. In holding that the railroad workers who transported the sugar cane to the processing plant were agricultural employees, the Court specifically rejected the proposition that the Act drew "a distinction between large and small farms or between mechanized and non-mechanized agriculture." 349 U.S. at 261. It also rejected the contention that Waialua was not entitled to the exemption because it was delivering the sugar cane to its own processing mills. 349 U.S. at 262-263.

Clearly, the ultimate motivation of Waialua was to market the processed sugar and molasses for a profit. In transporting the sugar cane to its processing plant, it was acting in furtherance of its processing and marketing operations. Nevertheless, it was also acting as "an incident to or in conjunction with" the farming activity of growing sugar cane.

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providing chickens to be processed and marketed, hopefully at a profit. Yet, the Board found that the hatchery employees were agricultural laborers.

In *Bayside,* the Court cited with approval the interpretative bulletin of the Wage and Hour Division of the Department of Labor regarding "contract arrangements for raising poultry." 429 U.S. at 303. This bulletin, reads in pertinent part:

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture (see §§ 780.137 et seq, and *Johnston v. Cotton Producers Assn.*, 244 F.2d 553).

29 C.F.R. §780.126.

This bulletin of the Department of Labor clearly contemplates that the processor's employees who work on the farms of the independent growers can be engaged in agriculture. In fact, the case cited by the Department of Labor, *Johnston v. Cotton Producers Association,* 244 F.2d 553 (5th Cir. 1957), involved an employee of a retail store who caught, cooped, and loaded on trucks chickens that were being raised by independent farmers. After being loaded, the chickens were transported to

processing plants. The Fifth Circuit held that this work was agricultural:

> It is, of course, the nature of the employee's work rather than the nature of the employer's business that brings him within or excludes him from the benefits of the Act. . . . Substantially all of [the employee's] work was done as a part of or in connection with the preparation for market and the delivery to market of poultry raised on farms. To the extent that this work was done on farms it was agricultural.

244 F.2d at 555 (citations omitted).

The phrase "incident to or in conjunction with such farming operations" was intended to exclude activities performed by a farmer or on a farm that were unconnected to the farming activities of either the farmer or the farm. The example used in the legislative history was of a farmer who operated a shirt factory on his farm. The shirt factory would clearly be unrelated to the farming activities of either the farmer or the farm. Congress did not intend to exclude activities related to the agricultural activites of the farm simply because the employer of the farm workers was motivated by some independent goal to make a profit.

Holly's chicken catchers and forklift operators are clearly acting as an incident to or in conjunction with the farming activites of either Holly Farms or the independent grower. The Board's conclusion to the contrary is not entitled to deference and should be rejected.

B. The Chicken Catchers And Forklift Drivers "Harvest" Live Chickens And Are Engaged In Primary Agriculture.

Under the plain language of §3(f), harvesting of agricultural commodities constitutes primary farming. The Secretary of Labor has held that the term "harvesting" includes reducing an agricultural commodity to possession. 29 C.F.R. §780.118(b). He has further held that "the term [agricultural commodity] includes domesticated animals and some of their products such as . . . eggs . . . ." 29 C.F.R. §780.112. The Secretary also views harvesting as including "transportation to a concentration point on the farm." 29 C.F.R. §780.118(b). Clearly, the chicken catchers, who catch and cage live chickens, thereby reducing them to possession, are engaged in harvesting. Similarly, the activities of the forklift driver in transporting the live chickens to the live haul truck, which is parked on the farm, constitute harvesting.[7] The Board's position that §3(f) includes harvesting of crops, but not animals such as poultry, *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992), is contrary to the plain language of the statute and is not entitled to deference.

It might be argued that Congress would not have added the "on a farm" language to §3(f) if harvesting was already included within the definition of primary agriculture. In fact, Senator Black was quite vocal that the preexisting language was sufficient to cover the independent wheat thresher and that the amend-

[7] Contrary to the assertion of the panel majority in the court of appeals (Pet. App. 46), Holly did not concede that the chicken catchers and forklift drivers were not engaged in primary agriculture. Holly's position was that they performed essential agricultural functions on a farm and came with the language and intent of §3(f).

ment was unnecessary. Because some senators disagreed, the amendment was added to make the intent of Congress clear. Senator Black's original interpretation, however, is supported by the plain language of §3(f).

IV.
HOLLY'S LIVE HAUL DRIVERS PERFORM DELIVERY TO MARKET AS AN INCIDENT TO OR IN CONJUNCTION WITH HOLLY'S FARMING ACTIVITIES AND ARE EXEMPT AGRICULTURAL LABORERS.

A. The Live Haul Drivers Are Engaged In Delivery To Market And Other Practices Incidental To Farming Operations.

Section 3(f) specifically defines "delivery to storage or to market" as a secondary farming practice. In *Maneja,* the Court held that a farmer's employees who delivered sugar cane to the farmer's processing plant were engaged in "delivery to market." The Court further held that "the transportation of farm implements, supplies and field workers to and from the fields" is a secondary farming practice. 349 U.S. at 261-262.

The live haul drivers transport the chicken catchers and forklift drivers to and from the fields and deliver the live chickens to Holly's processing plants. Thus, these drivers are engaged in secondary farming practices and are agricultural laborers if their activities are incidental to Holly's farming operations.

B. Holly Is Acting As A Farmer From The Time It Sends Its Live Haul Crews To The Farms Until Such Time As The Live Chickens Are Delivered To The Processing Plants.

Holly produces hatching eggs and breeds and hatches chicks. The hatched chicks are subsequently sent to contract growers to be raised to the age of forty-nine days. Holly retains title to the chicks while they are in the hands of the contract grower, and provides food, supervision, and other services to the grower. When the chickens reach the age of forty-nine days, Holly sends its live haul crews to the farms of the growers, where it catches, cages, and loads the live chickens on the live haul trucks and delivers the chickens to the processing plants.

It is undisputed that Holly is acting as a farmer in producing hatching eggs and breeding and hatching chicks. According to the Board, however, Holly ceases for all time to be a farmer once it delivers the chicks to the independent growers. Although the Board's position that Holly is not acting as a farmer while the chicks are in the possession and control of the contract growers has been approved as reasonable, its position that Holly is not acting as a farmer when it catches, cages, and loads the chickens onto trucks and delivers them to market is irrational and contrary to the intent of Congress.

In *Bayside,* the Court addressed the agricultural status of feed haul drivers of a vertically integrated poultry company whose operations were substantially similar to those of Holly. The drivers delivered feed from the employer's feed mills to the independent growers. The Court recognized that because the drivers did not work "on a farm", their status turned on "whether their activity should be regarded as work performed 'by a farmer'."

429 U.S. at 301. The Court held that although the issue was debatable, the Board acted reasonably in rejecting "the argument that all of the activity on a contract farm should be regarded as agricultural activity of an integrated farmer such as Bayside." 429 U.S. at 302. The Court noted that the contract farmer, not Bayside's employees, stored the feed and used it to feed the chicks and that the operation of a feedmill was not an agricultural operation. 429 U.S. at 303.

Bayside clearly does not control the disposition of this case. The Bayside drivers delivered feed, a processed product, to the independent farmers. Bayside did not have control of the chicks at the time the feed was delivered to the growers, and its employees were not involved in feeding the chicks. The independent growers were in possession of the chicks and were responsible for feeding and caring for the chicks. Thus, Bayside was not acting as a farmer at the time that its feed haul drivers were delivering feed to the growers.

Holly's status in catching, caging, loading, and delivering chickens to market is fundamentally different from Bayside's status in delivering poultry feed to the independent growers. Holly not only has title to the chickens, but it also retakes possession and control of the chickens from the independent grower. Its employees actually perform the agricultural tasks of catching, caging, loading, and delivering to market. In these circumstances, it is apparent that it is Holly, not the independent grower, which is acting as a farmer.

The Board's position that the employer's status as a farmer ends when it turns the chicks over to the independent growers is reasonable while the chicks are in the possession and control of the independent growers. It is not reasonable, however, to the extent that

it constitutes an invariable rule that the employer can never resume its status as a farmer. Holly is a farmer in producing hatching eggs and breeding and hatching chicks. It is not a farmer while the chicks are in the possession and control of the independent farmer. Holly resumes its status as a farmer when it sends its live haul crews to the farms to regain possession and control of the live chickens to which it holds title and to deliver them to market. It is the character of Holly's activities, not those of the independent grower, which make Holly's live haul drivers agricultural laborers. *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077, 1081 (5th Cir. 1980).[8]

Because Holly's live haul drivers are performing delivery to market of live poultry owned and initially raised by Holly, they are exempt agricultural laborers. The Board's conclusion to the contrary eliminates the "delivery to market" exemption for farmers who contract out part of the growing process, a result that is contrary to the language of the statute, as well as congressional intent.

---

[8] Unlike the Fifth Circuit's decision in *Sanderson Farms*, the Eighth Circuit's decisions in *NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105 (8th Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982), and *Valmac Industries, Inc. v. NLRB*, 599 F.2d 246 (8th Cir. 1979), which hold that live haul drivers are equivalent to the feed haul drivers in *Bayside*, contain no significant analysis of the facts in *Bayside* or of §3(f).

CONCLUSION

Holly's chicken catchers and forklift drivers perform essential farming activities on farms and satisfy the plain language of §3(f), whether or not Holly is acting as a farmer at the time of these activities. The Board's position, however, that Holly is not acting as a farmer is irrational and not entitled to deference. Holly acts as a farmer in producing hatching eggs and breeding and hatching chicks. Although it contracts out the raising process to independent growers, it retains title to the chicks at all times. When it sends its live haul crews out to the farm to catch, cage, and deliver its chickens to market, Holly resumes its status as a farmer. Thus, all of these employees, including the live haul drivers, are agricultural laborers.

Petitioners respectfully request that the judgment of the court of appeals be reversed in pertinent part.

Dated this 21st day of December 1995.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Petitioners' "live haul" crews—which consist of chicken catchers, forklift operators, and live haul drivers—collect broiler chickens that have been raised by independent contract growers and transport them to petitioners' processing plant. The question presented is whether the National Labor Relations Board reasonably concluded that those workers are not "agricultural laborer[s]" excluded from the coverage of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A78) is reported at 48 F.3d 1360. The decision and order of the National Labor Relations Board (Pet. App. A79-A205) and the decision of the administrative law judge (Pet. App. A206-A935) are reported at 311 N.L.R.B. 273. The Board's decisions in the representation proceeding (J.A. 17a-23a, 33a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1995. A petition for rehearing was denied on May 9, 1995. Pet. App. A936-A938. The

petition for a writ of certiorari was filed on August 4, 1995, and was granted on November 6, 1995, limited to the fifth question presented by the petition. Joint Appendix (J.A.) 46a. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Prior to July 1989, petitioner Holly Farms Corporation was engaged in the production, processing, and transportation of poultry. Pet. App. A5. On July 18, 1989, petitioner Tyson Foods, Inc. (Tyson), acquired 100% of the stock of Holly Farms, making it a wholly owned subsidiary of Tyson. *Id.* at A4, A11, A61, A715.[1] The issue before this Court concerns employees at Holly Farms' facility in Wilkesboro, North Carolina, *id.* at A230-232, which is a "vertically integrated poultry operation." *Id.* at A39. Operations at the Wilkesboro facility involve two kinds of chickens: "pullets," which are used for breeding; and broiler chickens, which are destined for human consumption. J.A. 5a, 7a, 12a, 15a. Although the employees at issue here are involved only with broiler chickens, some understanding of the processes involving each type of chicken is necessary.

Holly Farms purchases about 80% of its baby pullets from breeder companies and hatches the other

[1] In a ruling that was upheld by the court of appeals and is no longer at issue, the National Labor Relations Board found that petitioner Tyson became a successor to petitioner Holly Farms as of July 18, 1989. Pet. App. A13-A27, A110-A114. For convenience, hereafter we sometimes refer to petitioners collectively as "Holly Farms," even when discussing ongoing events that both precede and follow the date of successorship.

20% in its own hatchery. J.A. 7a-8a, 20a. The baby pullets (whatever their source) are taken, when one or two days old, to the farms of independent growers, who raise them to 20 weeks of age. J.A. 9a. When the pullets are 20 weeks old, they are taken from the growers' farms to "laying houses" also owned by independent farmers. J.A. 9a. The workers who catch the pullets and transport them from the growers' farms to the laying houses are called "pullet movers," J.A. 9a, 20a, or "pullet haulers," *e.g.*, J.A. 43a. The farmers who own the laying houses collect the eggs from the pullets and put the eggs into cartons. J.A. 10a. The cartons of eggs are transported by "egg haulers" from the independent laying houses to Holly Farms' hatchery facility. *Ibid.*

At Holly Farms' hatchery, the eggs are hatched and the new chicks are vaccinated and have their beaks trimmed. J.A. 11a-12a. Some of those chicks are designated as broilers. J.A. 12a. The broiler chicks are delivered, when newly born, to the farms of independent contract growers by "chick delivery boys." J.A. 12a-13a. The independent growers raise the broiler chicks to 49 days of age. J.A. 13a.[2] It is

[2] The contract between Holly Farms and the independent growers provided in relevant part (App., *infra*, 2a-3a):

> B. THE GROWER AGREES:
>
> 1. To furnish the necessary housing, equipment, fuel, water, shavings or litter, electricity, labor, and other facilities or items that are necessary in the opinion of the Producer to raise the birds to marketable weight.
>
> 2. To utilize his best skill, judgment, and knowledge in caring for and rearing the birds.
>
> * * * * *
>
> 4. To be present during the catching or removal of the broilers and to raise and move, prior to the arrival of

at that point that the employees at issue here, the "live haul" crew, enter the picture. J.A. 28a, 32a.

Holly Farms' live haul crews are made up of about 150 workers. J.A. 32a. Each crew consists of one live haul driver, one forklift operator, and several chicken catchers. J.A. 4a-7a, 13a, 28a, 36a. The live haul driver transports the crew on a flat-bed truck to the independent growers' farms. There, the chicken catchers manually capture the broiler chicks and place them in steel cages; the forklift operator lifts the cages onto the truck; and the driver returns with the loaded cages and the crew to the processing plant. Pet. App. A41, A230 n.54, A831; J.A. 13a-14a. At the processing plant, the driver drives the truck onto scales and then proceeds to an unloading dock, where other employees unload the cages. Pet. App. A820 n.285, A831 & n.291. In the course of a shift, each live haul crew typically makes several trips between the processing facility and the independent growers' farms. See *id.* at A831-A832.

2. On February 16, 1989, Chauffeurs, Teamsters and Helpers Local Union No. 391, a/w International Brotherhood of Teamsters, AFL-CIO (the Union) filed a representation petition with the National Labor Relations Board (Board), seeking an election in a unit consisting of Holly Farms' hatchery employees; the Wilkesboro live haul employees; and the service center mechanics, feed haul employees, and feed mill employees at a Holly Farms facility in

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live haul, the equipment to insure proper care of the equipment and facilities.

Although this contract was not formally moved into evidence in the Board proceeding, it was the subject of testimony before the Board and was marked as an exhibit.

Roaring River, North Carolina. J.A. 19a, 22a-23a, 37a-38a; Pet. App. A211-A212, A233.[3] Holly Farms urged the Board's Regional Director to dismiss the Union's petition on the ground that all of the employees in the proposed unit were "agricultural laborer[s]" excluded from the definition of "employee" under Section 2(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(3). J.A. 19a.

The Regional Director concluded that the Wilkesboro live haul employees are not "agricultural laborer[s]." J.A. 22a. He explained that "the Board has consistently held that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks." *Ibid.* (citing *Imco Poultry*, 202 N.L.R.B. 259 (1973)). He dismissed the Union's petition, however, concluding for other reasons that the Union had not proposed an appropriate bargaining unit. J.A. 23a.

On review of the Regional Director's decision, the Board found that the Wilkesboro live haul employees and the employees working at the Roaring River facility constituted an appropriate bargaining unit, and the Board directed an election in that unit. J.A. 44a; Pet. App. A211-A212, A233-A235.[4]

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[3] The Roaring River facility included a feed mill operation, at which feed mill employees produced feed that was delivered by feed haul drivers to the farms of independent growers where pullets, broilers, and hens were raised. J.A. 4a, 6a-7a.

[4] The Board also held that Holly Farms' hatchery employees, including the egg haulers and pullet haulers, are agricultural laborers. J.A. 21a-22a, 43a.

3. On July 27, 1989, the Board conducted an election in the unit that it had determined in the representation proceeding was appropriate. The election resulted in a 95 to 95 tie, with one determinative challenged ballot. Pet. App. A235, A818-A819. The Union filed election objections and unfair labor practice charges against petitioners. *Id.* at A208-A209 n.48, A213-A215. The Board's General Counsel issued complaints against petitioners, which were later consolidated with the Union's election objections and the ballot challenge. *Id.* at A208 n.48.

After a hearing, an administrative law judge (ALJ) sustained the challenge to the determinative ballot cast in the July 27, 1989, election; the election thus ended in a tie. Pet. App. A818-A819, A856-A857. The ALJ found that petitioners had committed "many serious violations" of the NLRA that precluded the holding of a fair rerun election. *Id.* at A816.[5] In addition, he found that the Union had achieved majority status in the unit, which it had demonstrated by signed authorization cards. See *id.* at A789. Based on those findings, the ALJ ordered petitioners to recognize and bargain with the Union as the representative of the Wilkesboro live haul and Roaring River employees, pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. A794, A919. Relying on the Board's determination in the representation proceeding, the ALJ rejected petitioners' renewed contention that the Wilkesboro live haul employees are "agricultural laborer[s]" excluded from the NLRA's coverage. *Id.* at A786-A787.

[5] The ALJ found that petitioners' officials at the Wilkesboro facility had violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by, among other things, threatening employees with arrest for distributing union literature on company property in non-work areas during non-work time, repeatedly interrogating employees regarding their union sympathies, and threatening employees with retaliation for wearing union insignia; and had violated Section 8(a)(3), 29 U.S.C. 158(a)(3), by, among other things, discriminatorily granting a pay increase before the election. Pet. App. A795-A796, A876, A878, A880, A883.

The Board upheld the ALJ's unfair labor practice findings and his entry of a *Gissel* bargaining order. Pet. App. A134-A163, A182-A183. In rejecting petitioners' challenge to the *Gissel* order, the Board (with one member dissenting) relied on its prior determination in the representation proceeding that the Wilkesboro live haul employees are not "agricultural laborer[s]." *Id.* at A83 n.8.

4. The court of appeals (with one judge dissenting in part) enforced the Board's order. Pet. App. A1-A53. As relevant here, the court upheld the Board's determination that the Wilkesboro live haul employees are not "agricultural laborer[s]." *Id.* at A52.

Relying on *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977), the court of appeals explained that, under the NLRA, "agriculture is defined in both a primary and a secondary sense": "[t]he primary meaning encompasses farming in all its branches, including the raising of poultry," while "the secondary meaning includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental[] to or in conjunction with primary farming operations." Pet. App. A44-A45 (internal quotation marks omitted). The court remarked that petitioners conceded that the Wilkesboro live haul employees do not engage in "primary" farming activi-

ties. *Id.* at A46. The court sustained the Board's determination that they also do not engage in "secondary" farming activities. *Id.* at A52. The court reasoned that the live haul employees' activities occur after "the Company has turned the broiler chicks over to independent contract growers and the Company's status as a farmer engaged in raising poultry (a primary agricultural activity) has ended." *Id.* at A48. The court held that those activities thus are not incidental to any primary farming operations on the part of petitioners. *Id.* at A48-A49.

SUMMARY OF ARGUMENT

I. The National Labor Relations Act (NLRA or Act) defines the term "employee" to exclude "agricultural laborer[s]." 29 U.S.C. 152(3). To be an "agricultural laborer" for purposes of the Act, a worker must engage in "[a]griculture," as that term is defined in Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(f). See, *e.g.*, *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977). As this Court has explained, Section 3(f) of the FLSA defines "[a]griculture" to mean farming in a "primary" and a "secondary" sense. See, *e.g.*, *Bayside*, 429 U.S. at 300.

Petitioners did not argue before the National Labor Relations Board (Board) or the court of appeals that their "live haul" crews engage in primary farming. See Pet. App. 46a. Thus, the only question that this Court should address is whether the Board reasonably concluded that the live haul crews also do not engage in secondary farming.

II. The Board reasonably concluded that petitioners' live haul crews do not engage in secondary farming.

A. The text of Section 3(f) indicates that secondary farming must meet three requirements: (1) it must be performed either "on a farm" or "by a farmer"; (2) it must be performed "as an incident to or in conjunction with" primary farming operations; and (3) those primary farming activities must be ones that are performed either by the same farmer who undertakes the putative secondary farming activity or on the same farm where the putative secondary activities occur. 29 U.S.C. 203(f).

Petitioners' live haul drivers do not meet the first requirement. They do not work "on a farm"; they merely drive to and from the farm. Moreover, neither their work nor that of the other members of the live haul crews (the chicken catchers and forklift operators) is performed "by a farmer." Under the Board's *Imco Poultry* rule, which this Court upheld in *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 302 n.9 (1977), Holly Farms ceases to act as a farmer when it turns the broiler chicks over to the independent growers. It does not resume its foregone "farmer" status when, 49 days later, it dispatches the live haul crews to the independent growers' farms to collect the mature chickens. At that point, Holly Farms is engaged in chicken-processing, which is not primary farming.

Even if we assume arguendo that the live haul crews meet the first requirement, they nonetheless do not engage in secondary farming because they do not meet the second and third requirements. If their work is deemed to be performed "by a farmer" (*i.e.*, Holly Farms), their work must be incidental to some primary farming activity by Holly Farms. That condition is not satisfied. Moreover, if it is recognized (as is the case) that the chicken catchers and fork-

lift operators work "on a farm," their work may qualify as secondary farming only if it is incidental to the independent grower's poultry-raising operations. The Board reasonably concluded that the work of the chicken catchers and forklift operators is not incidental to those operations, because the live haul crews' work begins only after the independent growers' work ends. The live haul crews play no role in the growers' discharge of their contractual responsibilities, and the growers take no part in the work of the live haul crews.

Petitioners argue that the chicken catchers and forklift operators engage in secondary farming because they are involved in the "preparation for market" of the chickens; and that the live haul drivers are involved in the "delivery to market" of the chickens. Those arguments ignore that, under Section 3(f), the practices of preparing a product and transporting it to market constitute secondary farming only if they are performed "by a farmer or on a farm as an incident to or in conjunction with" the primary farming operations of that farmer or on that farm. 29 U.S.C. 203(f).

B. Although petitioners rely on the legislative history of the phrase "or on a farm" in Section 3(f), it sheds no light on the question presented here.

C. The Department of Labor's regulations interpreting Section 3(f) of the FLSA support the Board's conclusion in this case. Those regulations make clear that the proper analysis focuses on whether the work of petitioners' live haul crew is performed "as an incident to or in conjunction with" the primary farming operations of the independent growers. The regulations also make clear that it is more accurate to characterize the live haul crews' work as incidental

to Holly Farms' chicken-processing operation (which is not primary farming) than to the growers' farming operations.

III. Petitioners seek to argue for the first time in their opening brief on the merits that the chicken catchers and forklift operators are engaged in primary agriculture. Petitioners' failure to advance that argument before the Board precludes its consideration in judicial proceedings to review the Board's decision. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). In any event, petitioners' primary farming argument is without merit. Petitioners argue that the work of the chicken catchers and the forklift operators is analogous to the "harvesting" (29 U.S.C. 203(f)) of a crop. The statutory definition of "[a]griculture," by its terms, precludes the analogy. The statute sets forth "the raising of * * * poultry" and other animals in a separate clause from the one that includes the term "harvesting." *Ibid.* That structure indicates that the term "harvesting" refers to the process of collecting crops of plants, not animals.

IV. The Board's conclusion that the workers on petitioners' live haul crews are "employee[s]," rather than "agricultural laborer[s]," under Section 2(3) of the NLRA is entitled to "considerable deference." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984); see *Bayside*, 429 U.S. at 302.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT PETITIONERS' CHICKEN CATCHERS, FORKLIFT OPERATORS, AND LIVE HAUL DRIVERS ARE "EMPLOYEE[S]," RATHER THAN "AGRICULTURAL LABORER[S]," UNDER SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT

The rights afforded to workers by the National Labor Relations Act (NLRA or Act) extend only to a worker who falls within the Act's definition of an "employee." See *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453 (1995). Section 2(3) of the Act provides that "[t]he term 'employee' * * * shall not include any individual employed as an agricultural laborer." 29 U.S.C. 152(3). The question before this Court is whether the Board reasonably concluded that the workers in petitioners' "live haul" crews are "employee[s]," rather than "agricultural laborer[s]," under Section 2(3) of the Act and are therefore within the Act's coverage.

I. TO BE AN "AGRICULTURAL LABORER," A WORKER MUST ENGAGE IN EITHER "PRIMARY" OR "SECONDARY" FARMING

The NLRA itself does not define the term "agricultural laborer" for purposes of Section 2(3) of the Act. As this Court has observed, however, "[a]nnually since 1946, Congress, in riders to the Appropriations Acts for the [National Labor Relations] Board, has tied the definition of 'agricultural laborer' in § 2(3) of the NLRA to § 3(f) of the [Fair Labor Standards Act (FLSA)]." *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977); see Pub. L. No. 103-333, Tit. IV, 108 Stat. 2570 (1994) (unnumbered section) (Board's current appropriations Act).

Section 3(f) of the FLSA ties the definition of "agricultural laborer" to that of "[a]griculture," which is defined as follows (29 U.S.C. 203(f)):

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As this Court has explained, the definition of "[a]griculture" in Section 3(f) of the FLSA "includes farming in both a primary and a secondary sense." *Bayside*, 429 U.S. at 300; accord *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762-763 (1949). Farming in its primary sense is defined in the first part of Section 3(f), as including "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * [and] the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. 203(f). "[S]econdary farming" (*Bayside*, 429 U.S. at 301) is defined in the second part of Section 3(f), as including "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, deliv-

ery to storage or to market or to carriers for transportation to market." Thus, "[t]he raising of poultry is primary farming, but hauling products to or from a farm is not primary farming. Such hauling may, however, be secondary farming if it is work performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations.'" *Bayside*, 429 U.S. at 301.

Petitioners did not argue before the Board or the court of appeals that the live haul crews engage in primary farming. Pet. App. A46. The only question properly before this Court therefore is whether the Board reasonably concluded that the live haul crews also do not engage in secondary farming. We show in Point II, *infra*, that the Board's conclusion is reasonable. We show in Point III, *infra*, that petitioners' "primary farming" argument, if considered, should be rejected.

II. THE BOARD REASONABLY CONCLUDED THAT PETITIONERS' LIVE HAUL CREWS DO NOT ENGAGE IN SECONDARY FARMING

A. The Board's Conclusion Is Consistent With the Text of Section 3(f) of the FLSA, as Construed by This Court

1. To constitute secondary farming under Section 3(f) of the FLSA, an activity must meet three conditions. First, the activity must be performed either "by a farmer" or "on a farm." 29 U.S.C. 203(f). Second, the activity must be performed "as an incident to or in conjunction with" primary farming activities. *Ibid.* Third, those primary farming activities must be ones that are performed either by the same farmer who undertakes the putative secondary

farming activity or on the same farm where the putative secondary activities occur. See *ibid.*

As this Court has explained, the third requirement is imposed by the use of the word "such" in Section 3(f)'s definition of "[a]griculture." *Farmers Reservoir*, 337 U.S. at 766 n.15. Secondary farming by a farmer or on a farm must be incidental to "such" primary farming activities as are undertaken by that farmer or on that farm, respectively. See *ibid.* For example, if a farmer processed not only commodities produced on his or her own farm but also commodities produced by other farmers, the processing of the other farmers' commodities would not constitute secondary farming. *Ibid.*

2. Petitioners do not contend that the live haul drivers work "on a farm," nor could they do so; the live haul drivers merely drive to and from the farms of the independent growers.[6] Petitioners do contend (Pet. Br. 33; see also Amicus Br. of American Farm Bureau *et al.* (AFB Br.) 11-12) that the live haul drivers' work, as well as that of the chicken catchers and the forklift operators, is done "by a farmer." In support of that contention, petitioners argue that Holly Farms acts as a farmer when it dispatches the live haul crews to the farms of the independent growers. Pet. Br. 31. That argument cannot be squared with this Court's decision in *Bayside*.

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[6] In contrast to petitioners, amicus National Broiler Council (NBC) does assert (NBC Br. 9) that the live haul drivers "assist the chicken catchers" on the growers' farms. The record contains testimony by one live haul driver indicating that he assisted in chicken catching on occasion, but not as part of his regular job duties. That evidence does not support the broad conclusion that the live haul drivers work "on a farm." *Cf.* Pet. App. A58 (Niemeyer, J., dissenting).

Bayside was an integrated poultry operation that bred and hatched chicks on its own farms but contracted with independent growers to raise the chicks to maturity for slaughtering at Bayside's processing plant. *Bayside*, 429 U.S. at 299, 301-302. The question before the Court was whether the work of the truck drivers employed by Bayside who hauled poultry feed from Bayside's feed mill to the farms of the independent contract growers constituted work done "by a farmer" for purposes of Section 3(f) of the FLSA. *Bayside*, 429 U.S. at 301-304.

The Court upheld the Board's determination that the drivers' work was not performed "by a farmer." *Bayside*, 429 U.S. at 302-304. The Court held that the Board had reasonably "rejected the argument that all of the activity on a contract farm should be regarded as agricultural activity of an integrated farmer such as Bayside." *Id.* at 302. In doing so, the Court specifically sustained the Board's *Imco Poultry* rule, 202 N.L.R.B. 259, 260 (1973), which provides that, "when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks." *Bayside*, 429 U.S. at 302 & n.9.

In a straightforward application of the *Imco Poultry* rule here, the Board likewise concluded that Holly Farms' status as a farmer ends when its broiler chicks are delivered to the farms of the independent growers. The work of the live haul crew with respect to those chicks does not begin until after the growers have raised the chicks to maturity. At that point, Holly Farms has ceased to act as a farmer. Thus, none of the work of the live haul crews (including

that of the chicken catchers and forklift operators) is done "by a farmer."

Petitioners argue (Pet. Br. 32) that *Bayside* "does not control" this case because petitioners' live haul crews "actually perform the agricultural tasks of catching, caging, loading and delivering to market." That argument falls short of the mark, however. Practices such as catching chickens and delivering them to market may constitute secondary farming if performed "by a farmer." But if such work is not performed "by a farmer" (or "on a farm"), it cannot constitute secondary farming.[7]

3. Whether or not this Court accepts our submission that the work of the live haul crews is not done "by a farmer," their work does not meet the second and third requirements for secondary farming.

a. If the Court agrees with our submission that the work of the live haul crews is not done "by a farmer," it is unnecessary to analyze the work of one component of the crew, the live haul drivers, because it is undisputed by the parties (see p. 15 and note 6, *supra*) that the live haul drivers also do not work "on a farm." The Board's conclusion that

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[7] Contrary to AFB's contention (AFB Br. 10-11), *Mitchell* v. *Budd*, 350 U.S. 473 (1956), does not require a contrary conclusion. See also NBC Br. 10. The Court in *Mitchell* held that, when a farmer grew tobacco on its own farm and processed that tobacco (and only that tobacco) in its off-farm bulking plant, "the agriculture operation * * * end[ed] * * * with the delivery of the tobacco at the receiving platform of the bulking plant." 350 U.S. at 481. The present case poses the analytically *prior* question of whether Holly Farms is properly regarded as a farmer at all when the mature chickens are collected, cooped, and delivered from growers' farms to petitioners' processing plant.

those drivers are not agricultural laborers would therefore have to be upheld.

We do not dispute that the chicken catchers and forklift operators work "on a farm" (29 U.S.C. 203(f)): the farms of the independent growers. It is also undisputed that the independent growers' operations constitute primary farming: "the raising of * * * poultry" (29 U.S.C. 203(f)). However, for the work of the chicken catchers and forklift operators to constitute secondary farming by virtue of its performance on a farm, it must meet the second and third requirements: namely, it must be performed "as an incident to or in conjunction with" the operations of the independent growers. 29 U.S.C. 203(f); see pp. 14-15, *supra*.

The Board reasonably concluded that the work of the live haul crew is not incidental to the independent growers' operations. The growers conduct their operations under contracts that require them to raise petitioners' chicks until they are 49 days old. At that point, the chicks are mature and ready for processing, and the growers' operations end. It is only at that point, however, that the live haul crew's work begins. The live haul crew thus plays no role in the growers' discharge of their contractual duties. Nor do the independent growers exercise any control over the live haul crew (who at all times remain petitioners' employees) or otherwise take any part in its work.[8]

[8] Petitioners err in asserting (Pet. Br. 25-26) that the Board's construction of the phrase "incident to or in conjunction with such farming operations" focuses on the ultimate motivation of Holly Farms to market processed chicken at a profit and is therefore inconsistent with *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254 (1955). Holly Farms' profit motive is not germane to the Board's construction of the statutory phrase. Moreover, *Maneja* is distinguishable from the present case. The Court in that case held that railroad workers who hauled farm implements and field laborers between their employer's sugar cane fields and its mill were agricultural laborers. *Maneja*, 349 U.S. at 260-263. The hauling was plainly performed "on a farm as an incident to or in conjunction with such farming operations" under Section 3(f), because the employer's mill, railroad tracks, and fields were all located on the employer's sugar plantation, and only cane grown in those fields was processed at the mill. 349 U.S. at 256-257.

Thus, although the live haul crews' work comes on the heels of the independent growers' operations, it is more accurately characterized as the first step of petitioners' chicken-processing operation, rather than as the last step of the independent growers' primary farming operations. See *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992). Accordingly, the Board reasonably concluded that the live haul crews' work is incidental to petitioners' processing operation, which, as explained below, is not primary farming. See p. 21, *infra*; see also *Bayside*, 429 U.S. at 301; 29 C.F.R. 780.126.[9]

[9] Amicus NBC argues (Br. 13 n.5) that it was irrational for the Board to classify pullet haulers, but not chicken catchers, as agricultural laborers. The Board could reasonably distinguish between those two categories of workers, however, on the ground that the chicken catchers' work was performed in conjunction with Holly Farms' processing operation, which was not primary farming activity, see *Bayside*, 429 U.S. at 301, whereas the pullet haulers' work was performed in conjunction with Holly Farms' poultry-raising operation, which was primary farming activity, see 29 U.S.C. 203(f). See J.A. 22a (concluding that egg haulers and pullet haulers are agricultural laborers because, "[a]lthough hauling, generally,

b. If the Court rejects our submission that the work of the live haul crew is not performed "by a farmer," that determination would reflect acceptance of petitioners' contention (Pet. Br. 31) that Holly Farms acts as a farmer when it sends the live haul crews to the independent growers' farms. Even under that theory, however, to meet the second and third requirements for secondary farming, the crews' activities would have to be performed "as an incident to or in conjunction with" some *primary* farming operation conducted by Holly Farms.

The crews' activities are not performed incidentally to any primary farming operation by Holly Farms. Although the independent growers' poultry-raising operations qualify as primary farming, under this Court's decision in *Bayside* the independent growers' operations cannot be attributed to Holly Farms. See 429 U.S. at 300-302 (upholding Board's view that the primary farming activities of independent growers are not attributable to integrated poultry company).

Moreover, the crews' work could reasonably be characterized as incidental to Holly Farms' processing operation. Indeed, Holly Farms' "live production" manager testified that the crews' work is the first step of the processing operation. J.A. 29a. The Court in *Bayside* recognized, however, that poultry-processing is not primary farming. See 429 U.S. at

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would appear to be a non-farming activity, the employees making pickups in the circumstances presented here, particularly considering the process and functional integration in the hatchery, are similarly engaged in the exempt activity of raising poultry").

301. The Department of Labor has similarly recognized that "[t]he activities of the * * * [poultry] processor are not 'raising of poultry.'" 29 C.F.R. 780.126; see also 29 C.F.R. 780.125(b) ("Slaughtering, which is the antithesis of 'raising,' is not included" in the " 'raising of poultry.' ").

Holly Farms does engage in primary farming operations when its employees hatch the eggs of the broiler chicks that are delivered to the independent growers' farms. See J.A. 10a-12a, 21a. But those operations end on the day that the chicks are hatched. J.A. 12a. The live haul crews' work does not begin until 49 days later, after the chicks have been raised to maturity by the independent growers. J.A. 13a. The work of the crew is too remote from the hatchery operations to be incidental to those primary farming operations.

Hence, even if, contrary to our submission, the Court determines that Holy Farms was acting as a farmer when it sent the live haul crews to the independent growers' farms, the crews' work is not secondary farming because it is not performed incidentally to any primary farming operation by Holly Farms.

4. Petitioners argue (Pet. Br. 19, 23) that the chicken catchers and forklift operators engage in secondary farming because they are involved in the "preparation for market" of petitioners' chickens; and (*id.* at 30) that the live haul drivers engage in secondary farming because they are involved in the "delivery * * * to market" of the chickens. See also NBC Br. 11-12; Amicus Br. of California Agricultural Labor Relations Board (CALRB Br.) 18. Those arguments ignore the text of Section 3(f) of

the FLSA. Section 3(f) lists "preparation for market" and "delivery * * * to market" among the specific "practices" that constitute "[a]griculture" only if performed "by a farmer or on a farm as an incident to or in conjunction with" the primary farming operations conducted by the farmer or on the farm. 29 U.S.C. 203(f). As explained above, the live haul crew's work falls outside Section 3(f) because it is not performed incidentally either to any primary farming operation by Holly Farms, or to the independent growers' operations.[10]

B. The Board's Conclusion Is Consistent With the Legislative History of Section 3(f) of the FLSA

Although petitioners rely heavily (Pet. Br. 15-19) on the legislative history of Section 3(f) of the FLSA, it does not support them. The legislative history cited by petitioners explains the origin of the phrase "or on a farm" in Section 3(f). It does not cast doubt on the Board's conclusion, based on a different portion of Section 3(f), that petitioners' live haul crews do not engage in secondary farming because their work is not performed "as an incident to

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[10] Amicus NBC argues (Br. 12) that "catching chickens on a farm and delivering them for processing is unquestionably 'incident to or in conjunction with' the raising of poultry, just as harvesting wheat * * * is incidental to the raising of that commodity." It is not enough, however, to be able to say in the abstract that a practice is "incident to" a primary farming activity. Rather, the practice must be "incident to" the primary farming operation of the farm on which the practice occurs, or, if performed by a farmer, "incident to" that farmer's primary farming operations. See pp. 14-15, *supra*. Neither condition is met in this case.

or in conjunction with" the independent growers' operations.

In the bill originally introduced in the Senate, "[a]griculture" was defined to include "any practices ordinarily performed by a farmer as an incident to such farming operations." 81 Cong. Rec. 7653 (1937). As this Court explained in *Farmers Reservoir*, the phrase "or on a farm" was inserted after the phrase "by a farmer" by an amendment on the Senate floor (337 U.S. at 767 (footnotes omitted)):

> As originally introduced, the exemption covered such practices only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. To take care of that situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm.

The Court in *Farmers Reservoir* made particular reference to the objection of Senator Tydings, who stated:

> In the case I visualize . . . the farmer is not performing the service. The man to whom I refer makes a business of doing nothing but threshing. He owns his own machine, and hauls it from farm to farm, and enters into contracts with farmers to thresh their crops; the point being that while he is dealing with an agricul-

> tural commodity, he is not necessarily a farmer, and he is not doing work ordinarily done by a farmer.

Id. at 767 n.16 (quoting 81 Cong. Rec. 7653 (1937)).

As petitioners observe (Pet. Br. 14-15), the legislative history clearly shows that "Congress intended that the definition of an agricultural laborer would include nonfarmers so long as their work involved primary farming activities or occurred on a farm and was incidental to the farming operations of the farm." While that history illuminates the purpose of the "or on a farm" phrase, it does not directly address the portion of Section 3(f) that is of central concern here: the phrase "as an incident to or in conjunction with such operations." 29 U.S.C. 203(f).

The threshing-machine operation described in the legislative history, which was considered by at least some legislators to constitute secondary farming, differs significantly from the work of petitioners' live haul crews. First, the live haul crew is not part of an enterprise that is in the "business of doing nothing but" providing chicken catching and transportation services. Rather, the activities of the live haul crew are merely the first part of petitioners' chicken-processing operation, which itself is only part of petitioners' vertically integrated poultry operation. Second, the chickens collected and transported by the live haul crew belong to petitioners, not the independent growers. See J.A 5a, 6a, 29a; Pet. Br. 31. While Congress may have intended by adding the phrase "or on a farm" to reach the employees of an independent contractor hired by a farmer to perform a service for the farmer, such as threshing the farmer's wheat, the legislative history does not

demonstrate that Congress intended to sweep within the agricultural exemption workers who (as here) enter onto a farm to perform a service, not for the farmer upon the farmer's commodities, but for an industrial firm upon the industrial firm's commodities. The Board could therefore reasonably conclude that such workers' activities are not performed "as an incident to or in conjunction with" the primary farming operations of those farms. 29 U.S.C. 203(f). Instead, such workers are properly regarded as industrial workers entitled to the NLRA's protection, rather than agricultural laborers.

C. The Board's Conclusion Is Consistent With the Department of Labor's Regulations Interpreting Section 3(f) of the FLSA

The Board's conclusion accords with the Department of Labor's interpretive regulations, which the Board seeks to follow "whenever possible," *Camsco Produce Co.*, 297 N.L.R.B. 905, 908 & n.14 (1990) (quoting *Imperial Garden Growers*, 91 N.L.R.B. 1034, 1037 (1950)), and which "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The Department of Labor regulation addressing the present situation, entitled "Contract arrangements for raising poultry," states as follows (29 C.F.R. 780.126):

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed

> dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f) [of the FLSA]. The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture (see §§ 780.137 *et seq.* and *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 553).

Under this regulation, as under the Board's decision, the status of petitioners' live haul crews depends upon whether they engage in secondary farming, which in turn depends upon whether they "perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm." 29 C.F.R. 780.126. Other Department of Labor regulations confirm the Board's conclusion that the live haul crews do not engage in secondary farming because their work is not performed "as an incident to or in conjunction with" the independent growers' poultry-raising operations.

In keeping with the text of Section 3(f) (see pp. 14-15, *supra*), the regulations provide that secondary farming must meet three requirements (29 C.F.R. 780.129) (bracketed numerals added):

> To come within this secondary meaning, [1] a practice must be performed either by a farmer or on a farm. [2] It must also be performed either in connection with the farmer's own farming operations or in connection with farming

> operations conducted on the farm where the practice is performed. [3] In addition, the practice must be performed "as an incident to or in conjunction with" the farming operations.

The first and third requirements are readily evident on the face of Section 3(f). As the regulations explain, the second ("in connection with") requirement is derived from Section 3(f)'s use of the word "such." See 29 C.F.R. 780.141; see also pp. 14-15, *supra*.

As discussed above, petitioners' live haul drivers do not meet the first requirement; they do not work "on a farm," and their work is not done "by a farmer." See pp. 17-18, *supra*; see also 29 C.F.R. 780.134 ("Any practice which cannot be performed on a farm, such as 'delivery to market,' is necessarily excluded [from secondary agriculture] * * * when performed by someone other than a farmer." (citations omitted)). In any event, none of the workers on the live haul crews meets the second ("in connection with") and third ("incident to") requirements prescribed in the Department of Labor's regulations.

With regard to the "in connection with" requirement, the regulations state (29 C.F.R. 780.143):

> The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted.

The regulations add that, in determining whether a practice is performed "for" a farmer, it is "highly significant" whether the practice involves property to which the farmer has title or for which the farmer otherwise has responsibility. *Ibid.* As discussed

above, the live haul crews' work involves property that belongs to petitioners, not the independent growers.[11] Moreover, Holly Farms has not been retained by the independent growers to render the independent growers any service; rather, the growers have been hired by Holly Farms to perform a service for Holly Farms: raising the chicks to maturity. The live haul crews' work begins only after the independent growers' responsibilities have ended. See pp. 18-19, *supra*. That work is therefore not performed "in connection with" the independent growers' operations.

With regard to the "incident to" requirement, the regulations state in relevant part (29 C.F.R. 780.144):

> The line between practices that are and those that are not performed "as an incident to or in conjunction with" such farming operations is not susceptible of precise definition. Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations

[11] If, in contrast to the facts of this case, the chicken catchers and forklift operators of an independent contractor were hired by a grower to cage and load chickens both raised and owned by the grower, the work of the chicken catchers and forklift operators might be characterized as being performed "for" the grower, and therefore to occur "in connection with" the grower's poultry-raising operations. Cf. 29 C.F.R. 780.136 (whether employees of independent contractors who work on a farm are engaged in secondary agriculture "depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm").

> involved, and does not amount to an independent business.

The work of the live haul crew is in no sense subordinate to the independent growers' operations. As explained above, the live haul crew plays no role in the independent growers' discharge of their contractual responsibilities, nor is the live haul crew under the direction of the independent growers.[12] Accordingly, even if the live haul crew's work were deemed to occur "in connection with" the independent growers' operations, it would not constitute secondary farming under the Department of Labor's regulations because it is not incidental to those operations.

Petitioners err in relying (Pet. Br. 23) upon a regulation that defines "preparation for market" to include "[c]ulling, grading, cooping, and loading" of poultry. 29 C.F.R. 780.151(k). Another regulation "emphasize[s] that 'preparation for market,' like other practices, must be performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations' in order to be within section 3(f)." 29 C.F.R. 780.150. The latter regulation makes clear that, to constitute secondary farming, it is not enough that an activity prepares a product for market; the activity must, in addition, occur "as an

[12] Cf. *Bayside Enterprises, Inc.*, 216 N.L.R.B. 502, 505 (1975) (work of truck drivers employed by integrated poultry producer, who delivered and unloaded poultry feed on farms of independent growers, was incidental to the operation of the employer's feed mill rather than the growers' farms), aff'd, 429 U.S. 298 (1977); *NLRB* v. *Samuel B. Gass*, 377 F.2d 438, 443-444 (1st Cir. 1967) (same; court notes that "[i]t is significant that these drivers are not employed or paid by the farms nor are they under the control of the farmers").

incident to" and "in connection with" primary farming operations.

Petitioners also err in relying (Pet. Br. 27-28) on the decision cited in 29 C.F.R. 780.126, *Johnston* v. *Cotton Producers Ass'n*, 244 F.2d 553 (5th Cir. 1957). See also NBC Br. 21; CALRB Br. 13. Johnston was employed by a retail store that sold baby chicks, feed, and other supplies to farmers. *Johnston*, 244 F.2d at 554. The court held that he was exempt from the FLSA as an agricultural laborer because "[s]ubstantially all of [his] work was done as a part of or in connection with the preparation for market * * * of poultry raised on farms." *Id.* at 555. Unlike Holly Farms' live haul crews, which play no role in the independent growers' poultry-raising operations, Johnston not only caught, cooped, and loaded the chickens onto trucks but also "supervise[d] the growing of the chicks by growers on their farms." *Id.* at 554. Moreover, unlike Holly Farms, the retail store that employed Johnston had no use for the mature chicks; it retained title to the chicks simply as security for the purchase price of the chicks and other material sold to the farmers. *Ibid.* The mature birds in *Johnston*, once cooped and caught, were delivered to third-party processors, not to the retail store. See *ibid.* Under those circumstances, it was reasonable to conclude that the employee's activities were performed "as an incident to or in conjunction with" the growers' operations. That conclusion does not conflict with the Board's contrary conclusion in the quite different circumstances of this case.

III. PETITIONERS' "PRIMARY FARMING" ARGUMENT SHOULD NOT BE CONSIDERED BECAUSE IT WAS NOT RAISED BELOW; IN ANY EVENT, IT CONFLICTS WITH THE TEXT OF THE STATUTE AND THE DEPARTMENT OF LABOR'S INTERPRETIVE REGULATIONS

Petitioners and some of their amici argue that the chicken catchers and forklift operators (but not the live haul drivers) engage in primary farming by "harvesting" an "agricultural commodity." Pet. Br. 29-30; AFB Br. 8-9; NBC Br. 9, 17. This Court should decline to consider petitioners' "primary farming" argument. If the argument is considered, it should be rejected.

A. Petitioners did not advance a primary farming argument before the Board or the court of appeals, and neither the Board nor the court addressed it.[13] Petitioners also did not raise the primary farming argument in their petition for a writ of certiorari; it appears for the first time in their opening brief on the merits. Cf. Sup. Ct. R. 24(a) (brief on the merits "may not raise additional questions or change the substance of the questions already pre-

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[13] Although petitioners did not expressly "concede" the primary farming issue, as the court of appeals believed (Pet. App. A46), they did not raise that issue at all. Instead, they made only a secondary farming argument. See Pet. C.A. Opening Br. 12 ("[T]he activities of catching, caging, and loading live chickens onto a truck for delivery are clearly incidental to or in conjunction with the primary farming practice of raising poultry on those farms."); Pet. C.A. Reply Br. 18 ("The thrust of Petitioners' position with regard to the chicken catchers and forklift operators is that they perform work on a farm that is incidental to the farming activities performed by the owner of the farm.") (emphasis omitted).

sented").[14] The question whether chicken catchers and forklift operators engage in primary farming is analytically distinct from the question whether they engage in secondary farming. See pp. 12-14, *supra*. Each of those questions, moreover, is one that the Board should have an opportunity to consider in the first instance. See, *e.g.*, *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984) ("the task of defining the term 'employee' is one that has been assigned primarily to the agency created by Congress to administer the Act") (internal quotation marks omitted). Under those circumstances, this Court should decline to consider petitioners' primary farming argument. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). Indeed, petitioners' failure to advance their primary farming argument before the Board creates a statutory bar to its consideration in judicial proceedings reviewing the Board's order. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (holding that under 29 U.S.C. 160(e) the court of appeals "was without jurisdiction to consider" an issue "not raised during the proceedings before the Board").

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[14] Petitioners framed the question presented in a manner that could be read to encompass a "primary farming" argument. See Pet. iv ("Are chicken catchers, forklift drivers, and live-haul drivers of a vertically integrated poultry producer considered agricultural employees under Section 2(3) of the National Labor Relations Act ('NLRA' or 'Act'), 29 U.S.C. § 152(3) (1973)?") (question 5). In the body of their petition, however, petitioners asserted only a secondary farming argument. See Pet. 60-61.

B. In any event, petitioners' contention that the chicken catchers and forklift operators are engaged in "harvesting" poultry conflicts with the text of Section 3(f) of the FLSA and the Department of Labor regulations interpreting the statute.

Section 3(f) differentiates "the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities" from "the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. 203(f). If the practices of "cultivation, growing, and harvesting" applied to poultry, then the statutory phrase "the raising of * * * poultry" would be superfluous. That result should be avoided. See, *e.g.*, *Astoria Fed. Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991). To avoid it, Section 3(f) must be construed to make only the "raising" (and not the "harvesting") of poultry a primary farming activity.

The chicken catchers and forklift operators do not "raise" the poultry that they catch and load onto trucks. The poultry has already been "raised" by the independent growers. Under the explicit wording of the statute, therefore, the chicken catchers and forklift operators are not engaged in primary agriculture. See *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992); accord 29 C.F.R. 780.125(b) ("The 'raising' of poultry includes the breeding, hatching, propagating, feeding, and general care of poultry.").

Petitioners' contrary argument (Pet. Br. 29-30) rests on a misreading of the Department of Labor's interpretive regulations. The regulations define the term "agricultural commodities" to include "domesticated animals and some of their products." 29 C.F.R. 780.112. The regulations also state that " '[h]arvesting' does not extend to operations subsequent to and unconnected with the actual process whereby agricul-

tural commodities * * * are severed from their attachment to the soil or otherwise reduced to possession." 29 C.F.R. 780.118(b). Reversing that negative formulation, petitioners argue that harvesting must include all operations in which "agricultural commodities," including "domesticated animals" such as poultry, are "reduced to possession." Pet. Br. 29.

Although petitioners' argument is plausible in isolation, it fails to take into account the positive definition of "harvesting" in the regulations (29 C.F.R. 780.118(a)):

> The term "Harvesting" as used in section 3(f) [of the FLSA] includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position.

The regulation goes on to confirm that "harvesting" is an activity performed upon non-animal agricultural commodities, such as "the cutting of grain, the picking of fruit, the stripping of bluegrass seed, and the digging up of shrubs and trees grown in a nursery." *Ibid.* While the "harvesting" of some non-crop agricultural commodities, such as fish, may constitute "farming" (see *Domsea Farms, Inc.*, 211 N.L.R.B. 832 (1974); 29 C.F.R. 780.109)), "farming," as applied to poultry, is limited by statute to the "raising of * * * poultry." 29 U.S.C. 203(f).

IV. THE BOARD'S DETERMINATION THAT PETITIONERS' LIVE HAUL EMPLOYEES ARE NOT "AGRICULTURAL LABORER[S]" IS ENTITLED TO DEFERENCE

This Court has repeatedly recognized that the Board's interpretation of the term "employee" in Section 2(3) of the NLRA "is entitled to considerable deference." *Sure-Tan*, 467 U.S. at 891; see also,

e.g., *Town & Country Electric, Inc.*, 116 S. Ct. at 453; *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). In addition, the Court has stated that the Board's construction of the exemption for agricultural laborers in Section 3(f) of the FLSA "is one we must respect even if the issue might 'with nearly equal reason be resolved one way rather than another.'" *Bayside*, 429 U.S. at 302 (quoting *Farmers Reservoir*, 337 U.S. at 770 (Frankfurter, J., concurring)).[15] Where, as in this case, the Board's conclusion that particular employees are not "agricultural laborer[s]" reflects a reasonable interpretation of the text of Section 3(f) and is consistent with the legislative history of that provision, the Board's prior decisions, and the Department of Labor's construction of the statute, "the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order." *Bayside*, 429 U.S. at 303-304; see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981).

Moreover, because Section 3(f) defines an area partially exempted from the regulatory framework established by the FLSA,[16] it must be "narrowly con-

---

[15] This Court's decision in *Bayside* forecloses petitioners' argument (Pet. Br. 11-12) that the Board's interpretation of Section 3(f) is not entitled to deference. See also NBC Br. 20; AFB Br. 19.

[16] See, *e.g.*, FLSA Section 13(a)(6), 29 U.S.C. 213(a)(6) (partial exemption from minimum wage and overtime pay provisions for certain employees employed in "agriculture" as defined by Section 3(f)); see generally 29 C.F.R. 780.100.

strued against the employers seeking to assert [it]" and its application must be limited to those falling "plainly and unmistakably within [its] terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); accord *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). It cannot be said that Holly Farms' chicken catchers, forklift operators, and live haul drivers fall "plainly and unmistakably" within the Section 3(f)'s agricultural exemption. The Board's determination that these employees are NLRA "employees" is therefore entitled to affirmance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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National Labor Relations Board

JANUARY 1996

APPENDIX

WILKESBORO DIVISION
Effective 2/4/85

AGREEMENT

THIS AGREEMENT made this the —— day of ————————, 19—, by and between Holly Farms Poultry Industries, Inc., a North Carolina corporation, hereinafter referred to as the "Producer," and ————————————, hereinafter————————— referred to as the "Grower."

WITNESSETH:

THAT WHEREAS, Holly Farms Poultry Industries, Inc. is engaged in the production of poultry on an integrated basis, being responsible for the rearing of chickens from the breeder hens to the processing of the poultry into dressed product; and

WHEREAS, the Grower has represented himself as an experienced and knowledgeable person in the field of rearing poultry, possessing skill and knowledge to supervise and direct the efficient rearing of broilers; and

WHEREAS, the Producer desires to utilize the professed skill, judgment, discretion and knowledge of the Grower on a contractual basis for the production of broilers for use in its processing plants; and

WHEREAS, the compensation of the Grower is predicated upon the skill, knowledge and discretion which he agrees to utilize and purports to possess in

the production of the chickens under his control and supervision; and

WHEREAS, the Grower warrants that he is the owner of or in the possession of a farm together with improvements located thereon, sufficient and adequate for use in rearing chickens or broilers.

NOW, THEREFORE, in consideration of these premises and the mutual agreements herein set out, the parties do hereunto agree as follows:

A. THE PRODUCER AGREES:

1. To furnish and deliver baby chicks to the Grower's farm to be grown out as broilers subject to the termination right of either party as set forth hereinafter.

2. To furnish and deliver all feed and medication which the Producer, with the advice of the Grower, determines to be adequate and sufficient to rear the broilers to marketable weight.

3. To pay Grower in accordance with the formula or method hereinafter set out in this agreement on the following time schedule:

a. The Grower will notify the Producer when the unused feed may be picked up.

b. The Grower's settlement will be made within a period of fourteen (14) working days from the day the unused feed is picked up.

B. THE GROWER AGREES:

1. To furnish the necessary housing, equipment, fuel, water, shavings or litter, electricity, labor, and other facilities or items that are necessary in the

opinion of the Producer to raise the birds to marketable weight.

2. To utilize his best skill, judgment, and knowledge in caring for and rearing the birds. The Grower further agrees that no feed, chicks, or medication furnished by the Producer will be used for any purpose other than the rearing of birds under this agreement, and that in the event feed or other supplies remain in the feeders after the rearing of one flock, this feed or supplies will be utilized in the rearing of the next flock or returned to the Producer.

3. To permit at any time inspection of birds and growing facilities by the Producer or its agents.

4. To be present during the catching or removal of the broilers and to raise and move, prior to the arrival of live haul, the equipment to insure proper care of the equipment and facilities.

5. To exercise the necessary supervision and planning in order to provide properly maintained roads or passageways to poultry houses and around poultry houses.

6. To warrant that the Grower is the owner of the land, buildings, and equipment utilized in the rearing of the chickens or that the Grower is in the legal possession of the property and has the right and authority to utilize the same for this purpose.

C. THE PRODUCER AND THE GROWER JOINTLY AGREE:

1. That the delivery date and the number of baby chicks to be placed with the Grower will be determined by consultation and agreement between the Grower and the Producer with the final decision being made by the Producer.

2. That after the removal of each flock, the Grower will be paid in accordance with a method or formula as follows:

a. A figure to be known as the individual Grower's Efficiency Point Factor will be ascertained. The Grower's efficiency point factor will be calculated by determining the Grower's total number of net live weight pounds of poultry grown and the total efficiency points assigned for settlement purposes of the feed (580 points per 100 pounds), and chicks (20 points each) utilized in producing the broilers. After the Grower's efficiency points have been determined, the total number of pounds of broilers will be divided into the total efficiency points giving the efficiency point factor. The efficiency point factor ascertained by this division will constitute for settlement purposes the individual Grower's settlement based on the average of all grower's efficiency points whose broilers were moved in the same settlement period. (The average of all grower's efficiency points whose broilers were moved in the same settlement period is known as the "floating average.")

b. *Basic Grower Payment*

(1) The individual Grower's efficiency point factor per pound in relation to the floating average as ascertained by the method set out above will be applied to Exhibit A entitled "Basic Grower Payment Schedule." The applicable figures appearing in the column will be ascertained and payment will be made by applying the figures to the applicable column on

Exhibit A. For example, the average of all growers' efficiency points (floating average) whose broilers were moved in the same settlement period is 10.30 points, and the individual Grower's efficiency point factor is 10.00 points, then the individual Grower will receive floating average pay plus a .30 point equivalent lower than the floating average which scales out on Exhibit A to be $149.00 per thousand broilers sold. If the floating average is 16.30 points, then the individual Grower's efficiency point factor is 16.60 points, and the individual Grower will receive floating average pay less a .30 point equivalent higher than the floating average which scales out on Exhibit A to be $131.00 per thousand broilers sold.

(2) The settlement period for obtaining the floating average will be one week (Monday through Saturday's kill), but in no case will the settlement period contain less than 10 flocks. For example, when 8 flocks are moved in a particular week, two flocks would be added to these 8 flocks making up the 10-flock settlement group. The efficiency point factors used for these two flocks would be the same as the floating average efficiency point factor from the previous week.

(3) For the purpose of determining the weekly floating average, growers whose efficiency point factor is 1.50 points per pound more or less than the average for the settlement period will not be used for figuring grower pay other than his own.

(4) A copy of the composite Grower's efficiency points for determining the floating average will be available at the office of the Producer.

(c) *Market Advantage Bonus Payment.* A market advantage bonus payment will be paid

to the Grower based upon the Market Advantage Factor determined by reference to the chart attached hereto as Exhibit B and its relationship to the Monday Final Georgia Dock Market plus one cent. The Monday Final Georgia Dock Market plus one cent set forth on Exhibit C refers to the simple average of three quoted markets (Monday of the week of processing and the two previous Mondays). The prices set forth on Exhibit B refer to the quoted cash price per bushel of Chicago, Illinois #2 yellow corn and the quoted cash price per ton of Decatur, Illinois 49% soybean meal. These prices will be averaged on Monday of the week of processing for the previous three Mondays of trading and are not necessarily indicative of the price which the Producer pays for any and all of its corn and soybean meal. The market advantage factor as determined by Exhibit B is predicated upon the average consumption of corn and soybean meal per pound of dressed poultry, the average quoted market price of corn and soybean meal for the three Mondays immediately preceding the week of processing, and the estimated freight on the corn and soybean meal. The market advantage factor is then related to the Monday Final Georgia Dock Market plus one cent by use of the Market Advantage Bonus Payment Chart (Exhibit C) in order to determine the market advantage bonus payment per thousand birds processed. The Monday Final Georgia Dock Market plus one cent is used for convenience and is not necessarily indicative of the price at which the Producer sells its poultry products and the market advantage bonus payment chart includes

an estimated constant factor to cover all additional charges.

As an example in determining the market advantage bonus payment, assume corn price of $2.70 per bushel and soybean meal of $160.00 per ton. Exhibit B shows a market advantage factor of 15.38. Then assuming a Monday Final Georgia Dock Market plus one cent of 49.00 cents per pound, the market advantage bonus payment determined by use of Exhiibt C is $9.50 per thousand birds sold.

d. A settlement sheet prepared in accordance with the procedures hereinabove set out and reflecting the amount paid the Grower, the efficiency point factor per pound, the average of the Monday Final Georgia Dock Market price plus one cent of the Monday of the week of processing and the two previous Mondays; the average of the previous three Monday's daily prices on #2 yellow corn and 49% soybean meal; and other information will be furnished the Grower.

3. In the event of one hundred percent (100%) loss of all birds placed in any one house as a result of fire or disease not resulting from the negligence or intentional acts of the Grower, the Producer will pay the Grower $7.00 per thousand chickens placed for each week including fractions thereof which the Grower has had the chickens. For example, if fire destroys a house of 10,500 birds at five weeks and two days of age, the grower pay for this house is $388.50. A loss of eighty percent (80%) or more of the flock shall be interpreted for purposes of this paragraph as one hundred percent (100%) loss.

4. That for the convenience of not having to initiate a new agreement after each flock, this agree-

ment shall remain in full force and effect with the privilege on the part of either party to terminate the same after the removal of any particular flock. In the event of termination, the Producer shall have the right and privilege to enter the premises and remove any feed, medication, equipment, and other property belonging to the Producer.

5. In the event the Producer in its sole judgment shall determine that the flock or birds in possession of the Grower is deteriorating or that the Grower is failing to maintain the normal and ordinary growth, or in the event the Grower shall wrongfully dispose of feed, chicks, medication, or any other property of the Producer, then the Producer may engage a court of proper jurisdiction and obtain an injunctive or mandatory order authorizing the Producer to go upon the premises of the Grower and remove therefrom the birds, feed, medication, supplies, or other property belonging to the Producer. The Grower, under these circumstances, does hereby forfeit any compensation or payment he would otherwise receive with reference to this flock.

6. That title to feed, chicks, and medication furnished by the Producer is and shall remain the sole and exclusive property of the Producer.

7. The Producer and Grower are each independent contractors performing services using their separate discretion and judgment. The Producer and the Grower shall, in their separate and independent discretion, employ and supervise exclusively their own servants, agents and employees.

8. That Producer shall under no circumstances be held responsible for damages to Grower caused by delay or failure to perform hereunder when such delay or failure is due to fire, strikes, acts of God,

legal acts of public authorities or delays or defaults due to labor, feed, chick, or medication shortages.

The provisions of the paragraph are subject to and are not inconsistent with Part C, section 3, page 7, of this agreement. The Producer agrees to comply with the provisions of Part C, section 3, page 7 of this agreement.

IN WITNESS WHEREOF, the respective parties have hereunto, either in person or by their authorized agents, affixed their hands and seals hereto.

HOLLY FARMS POULTRY INDUSTRIES, INC.

By _____

Grower _____ (Seal)

Spouse _____ (Seal)

_____

Business Name or Account Name of Grower

_____

Address

( )

_____

Telephone Number Social Security or Identification Number

[Exhibits Omitted]

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Supreme Court, U.S.
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No. 95-210

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCALS 391, 29, 71, 355, 592, 657, 988,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE RESPONDENT UNIONS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioners' live haul workers (chicken catchers, forklift drivers and live haul drivers) are National Labor Relations Act "employees" within the meaning of NLRA § 2(3), 29 U.S.C. § 152(3), and not exempted "agrivultural laborers" within the meaning of that provision.

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IN THE

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v.

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CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCALS 391, 29, 71, 355, 592, 657, 988,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF FOR THE RESPONDENT UNIONS

The opinions below, the basis for this Court's jurisdiction, and the statutory provisions involved are set out at pp. 1-3 of the Brief for the Petitioners.

COUNTERSTATEMENT OF THE CASE

The facts that frame the question presented are fully set out in the following two paragraphs of the opinion below:

> The [Holly Farms] Wilkesboro plant is a vertically integrated poultry operation. In its hatchery operations, Holly Farms hatches pullets, or laying hens. At twenty weeks of age, the pullets are transferred to "laying houses" operated by independent "contract growers." The eggs produced by the pullets are

transported back to the Holly Farms hatchery operations, where they are hatched. The Company transports the resulting chicks to independent contract growers who are paid to raise the chicks into full-grown broiler chickens. When the birds are seven weeks old, the live-haul crews catch, cage, and transport them to a storage and cooling area near the processing plant, where they will be slaughtered and prepared for market.

The employees in the live-haul unit serve as the Wilkesboro facility's chicken-catching crews. A crew consists of a live-haul truck driver, a forklift operator, and about nine "chicken catchers." The live-haul driver drives a flat-bed truck, which carries the entire crew to the farms of the independent contract growers who raise the broiler chickens. Under cover of darkness, the chicken catchers manually catch and cage the chickens, the forklift operator places the steel cages on the flat-bed truck, and the truck delivers the chickens to a storage area near the Company's processing plant. [48 F.3d at 1369-70 (footnote omitted).]

SUMMARY OF ARGUMENT

Live haul workers employed by vertically integrated poultry companies collect full grown broilers from the independent contract farms where the chickens are raised and transport the broilers to the companies' processing plants. The line-drawing issue in this case is whether these live haul workers are doing work incident to the companies' processing operations (and are therefore "employees" covered by the National Labor Relations Act) or incident to the farming operations of raising the broilers (and are therefore "agricultural laborers" exempted from coverage under the NLRA).

The legal determinants of the line to be drawn are well settled. The live haul workers are exempted from coverage under the NLRA if, but only if, those workers

are involved in "agricultur[al]" operations as that term is defined in § 3(f) of the Fair Labor Standards Act. Under the express language of FLSA § 3(f), the raising of chickens is an agricultural operation. On the other hand, as this Court recognized in *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298 (1977), the processing of chickens for ultimate sale to the consumer (*e.g.*, the slaughtering and dressing of the chickens) is *not* an agricultural operation. *Infra* at 4-6.

The factual determinants of the line to be drawn are equally definite. Through the exercise of their economic leverage over independent contract farmers, the vertically integrated poultry companies, like petitioners here, have structured their overall business in a manner that (i) limits the independent farmer's function to the raising of chickens; and (ii) assures that the company's own processing plant employees—using the company's own equipment—perform all live haul operations. And the integrated poultry companies have done so precisely to facilitate the efficient use of the companies' highly capitalized processing plants. All this being so, the various live haul operations at issue here are classified by the industry and by independent experts as a component part of the companies' "processing" operations and not as a component part of the contract farmers' chicken raising operations. *Infra* at 6-10.

Not surprisingly, then, the NLRB has consistently taken and adhered to the position that the integrated poultry companies' live haul workers are doing work incidental to the companies' non-exempt processing operations rather than incidental to exempted farming operations. And the NLRB's position finds strong support in a directly-on-point Department of Labor interpretive regulation (29 CFR § 780.143) elaborating on FLSA § 3(f). *Infra* at 10-13.

The plain language of FLSA § 3(f) does not answer the precise line drawing legal question presented here.

And the Board's resolution of that question is entirely consistent with the purposes of Congress in exempting "agricultur[al]" operations from both the FLSA and the NLRA. In these circumstances, the NLRB's eminently reasonable judgment of where to draw the line between agricultural and nonagricultural operations in the specific context of the vertically integrated poultry industry is entitled to substantial deference and should be affirmed. *Infra* at 13-14.

ARGUMENT

This case presents a single, line-drawing question—albeit one that runs through a major American industry: in the specific context of vertically integrated broiler chicken production where does "agriculture" end and where does "processing" begin.

This question arises because what is in biological terms unitary—the hatching, raising and processing for consumption of a single broiler chicken—has been compartmentalized by the law and by industry economic imperatives.

A. The legal determinants of the line to be drawn are well settled. The National Labor Relations Act governs labor relations between employers in and affecting interstate commerce and their employees with one exception relevant here—NLRA § 2(3) defines the term "employee" to exclude "any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). And, Congress, in riders to the Appropriations Acts for the National Labor Relations Board ("NLRB" or "Board"), has tied the definition of "agricultural laborer" in NLRA § 2(3) to the definition of "agriculture" in § 3(f) of the Fair Labor Standards Act ("FLSA"). *See Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 n.6 (1977).[1]

[1] FLSA § 3(f) provides, in full:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As this Court has explained, the FLSA § 3(f) term "agriculture" has both a primary and a secondary meaning. "First, . . . [a]griculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning." *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949). The "raising of . . . poultry" is one of the express § 3(f) primary agricultural activities. *Supra* n.1. But "[s]laughtering, which is the antithesis of 'raising,' is not included" in the statutory definition of "raising . . . poultry." 29 CFR § 780.125.

In addition, and more broadly, "[a]griculture is defined [by FLSA § 3(f)] to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations." *Farmers Reservoir*, 337 U.S. at 763. An outer boundary of § 3(f) "agriculture," then—and the one relevant here—is set at non-farming practices performed on a farm "as an *incident to or in conjunction with* [the] farming operations" in question. *Supra* n. 1 (emphasis added).

At the same time, it is well settled that the *processing* of broiler chickens for ultimate sale to the consumer—*e.g.*, the slaughtering and dressing of the chickens—is *not* an FLSA § 3(f) agricultural activity.

This Court squarely held in *Bayside* that the fact that an integrated poultry company—one that, *e.g.*, hatches

chicks, puts the chicks out to independent farmers to be raised and then takes the full grown broilers and processes the birds—engages in (or contracts for the performance of) certain farming activities does not somehow render *all* of the company's activities agricultural in nature. To the contrary, where such a company has and runs a "mill . . . which . . . produces poultry feed and [a] processing plant in which it slaughters and dresses poultry," the mill and the plant are "*not* agricultural operations." *Bayside*, 429 U.S. at 301 (emphasis added). *See also Mitchell v. Budd*, 350 U.S. 473, 480-82 (1956).

It follows, said the *Bayside* Court, that "the status of . . . drivers" employed by the integrated poultry company who deliver feed from the company's mill to farmers who have contracts with the company to raise chickens "is determined by the character of the work they perform for their own employer," and that "the work of the contract farmer cannot make the drivers agricultural laborers." 429 U.S. at 303. On this cases *Bayside* holds that the integrated poultry company's feed mill drivers are "employees" within the meaning of NLRA § 2(3) and not "agricultural laborers" within the meaning of the exemption stated in that provision. *Id.*

B. The factual determinants of the line to be drawn here are equally definite.

By and large broiler chicken production is vertically integrated. *See, e.g., National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 821 (1978) ("All the members of NBMA are 'integrated,' that is, they are involved in more than one of these stages of production . . . . The member . . . places its chicks with [the] independent grower for the growing out period . . . and with its own employees, usually collects the mature chickens from the grower.").

Moreover, as this Court recognized in *National Broiler Mktg. Ass'n*, the integrated poultry companies have substantial economic leverage in their relationship with these independent contract farmers. 436 U.S. at 824-26.[2]

As here, the integrated poultry companies have almost invariably exercised their economic leverage (i) to limit the independent farmer's function to the raising of chickens; and (ii) to assure that the company's own processing plant employees—using the company's own equipment—perform all live haul operations.[3]

It is very much to the point that the integrated poultry companies have structured their contractual relationship with their independent farmers in this manner precisely to facilitate the efficient use of the companies' highly capitalized processing plants. The companies contract with numerous chicken-raising farms in the vicinity of the companies' processing plants, and when the chickens reach the proper age, size and weight the companies dispatch the companies' own live haul crews and equipment to collect the grown chickens. In this way the companies are able to secure for themselves the flexibility and the economies of scale that are essential in "supply[ing] wholesome products on a continual, reliable, and profit-

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[2] *See, e.g.*, P. Ahlo, *Broiler Grower Contracts in the United States*, Broiler Industry (Oct. 1988) 26 ("The broiler industry in the United States consists primarily of contract growers and large vertically integrated firms called integrators. The integrators, through ownership or control, coordinate the stages of production and distribution of broiler chickens."); M. Timmons & P. Ahlo, *A Broiler Production Analysis Equation*, 66 Poultry Science 586, 586 (April 1987) ("The growers provide the labor and capital for the growout stage without ever owning any broilers.").

[3] A 1977 survey of approximately 1000 contracts between integrated poultry companies and independent growers found that live haul operations were performed by the company itself in more than 95 percent of the cases. William L. Henson, *The U.S. Broiler Industry: Past and Present Status, Practices, and Costs*, Pennsylvania State University Agricultural Experiment Stations No. 149, at 20 (May 1980).

able basis." M. Eckman & R. Brewer, *The Commercial Broiler Industry*, Alabama Agribusiness (Auburn Univ. Cooperative Extension Service 1988) 2.

> Integration in the poultry industry permits the collection of large amounts of a uniform product available when needed. . . . In the case of broilers, turkeys, and fowl for meat, processing plants can coordinate production needs by hauling in flocks from several farms to supply the birds needed for the plant for a day.
>
> * * *
>
> . . . Most company trucks and cars now have two-way radios, permitting constant coordination between the plant and the farm. For example, if a truck breaks down or becomes stuck in the snow or mud, the processing plant has several hours to send in an alternate source of birds to keep the plant running near capacity. [C. Parkhurst & G. Mountney, *Poultry Meat and Egg Production* 151-52 (Van Nostrand Reinhold Co. 1988).]

All this being so, the various live haul functions at issue here are classified by the industry and by independent experts as a component part of the integrated poultry companies' "processing" operations and not as a component part of the contract farmers' chicken raising operations. Thus, trade publications and industry studies analyze the "processing" operation as consisting of distinct stages, including "assembling," "slaughtering," "eviscerating," "packaging," and "storage." As the Table set out below illustrates, the "assembling" stage is defined specifically to include the live haul "catching," "loading" and "transporting" functions performed by the integrated poultry company worker whose status is at issue here.

TABLE 10.1. Poultry-Processing Functions

[Parkhurst & Mountney, *supra*, 155 (emphasis added).]

Assembling	Slaughtering	Eviscerating	Additional processing uncooked
Catching *Loading* *Transporting* *Unloading*	Shackling Killing Bleeding Scalding Defeathering Washing Removing head and feet	Removing preen gland Opening and inspection of remaining viscera Separation of heart, gizzard and liver Washing Grading Weighing Chilling	Whole carcass Whole carcass cut up Individual parts Half carcasses Hand or mechanically deboned meat

Additional processing cooked	Packaging	Storage	Other
Cooked, deboned meat Fried battered parts Barbecued Canned whole or deboned Canned soups, stews, etc. Comminuted products Rolls Ham	Plastic bags with and without vacuum Tray with plastic overwrap Cardboard cartons including laminates and overwraps Metal, cardboard or wood ice-packed bulk containers	Ice packed Chilled Dry pack, refrigerated Frozen Canned Freeze or heat, dehydrated Irradiated (future)	Plant cleanup and sanitation Waste disposal Waste treatment and by-product recovery Insect and rodent control Plant and product safety Plant security Fiscal and personnel management

See also e.g. V. Benson, et al., *The Chicken Broiler Industry: Structure, Practices, and Costs,* Agricultural Economic Report No. 381 (U.S. Dep't of Agriculture 1977) (outlining industry trends in "processing" operations, defined to include, *inter alia,* "assembly," "slaughtering," and "eviscerating"); F. Lasley, et al., *The U.S. Broiler Industry,* Agricultural Economic Report No. 591 (U.S. Dep't of Agriculture 1988) (analyzing trends in "processing and transportation costs, which include assembling"); J. Beierlein, et al., *Optimizing the Assembly Processing-Distribution System of Processed and Further-Processed Chicken in Pennsylvania,* 8 Agribusiness 335 (1992) (analyzing the economic efficiency of the "assembly-processing-distribution system" utilized by the broiler industry in Pennsylvania).

C. It is against this legal and factual backdrop that the NLRB has consistently found that the integrated poultry companies' live haul workers are engaged in tasks incidental to the companies' non-exempt processing operations rather than tasks incidental to exempted farming operations:

> As the service crew employees involved herein are engaged in handling and transporting chicks on the farms of independent growers only after Respondent's farming operations have ended, these employees cannot be performing practices incident to, or in conjunction with, Respondent's farming operations. More accurately, they are engaged in nonfarming operations which are incident to, or in conjunction with, a separate and distinct business activity of the Respondent, i.e., shipping and marketing. [*Imco Poultry,* 202 NLRB 259, 260-61 (1973).]

Accord e.g. Draper Valley Farms, 307 NLRB 1440, 1440 (1990) ("[W]e find that the Employer's chicken catchers are engaged in activity incidental to a separate and nonfarming business activity of the Employer, and thus do not fall within the agricultural labor exemption contained in Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3).").[4]

D. The Board's position in the foregoing cases finds strong support in a Department of Labor interpretive regulation elaborating on FLSA § 3(f) that addresses the precise situation here.[5] The DOL regulation states, in pertinent part:

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[4] In *Draper,* the Board also fully (albeit summarily) disposed of the argument—which petitioners seek to assert in the alternative here although they did not assert it below (*see* Brief for Petitioners at 29-30)—that the catching of chickens constitutes "primary" agricultural activity:

> [W]e reject the Employer's contention that its chicken catchers are engaged in primary agricultural activity, namely "harvesting," as defined in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. § 203(f). Although the harvesting of crops is included in the primary definition of agriculture under Section 3(f), only the "raising" of poultry is covered, not its so-called harvesting, even assuming, arguendo, that term is appropriate in any context when applied to poultry. [307 NLRB at 1440 (footnote omitted).]

[5] The Department of Labor has been entrusted with the administration of the FLSA, and the Department's regulations interpreting the FLSA are therefore entitled to substantial deference. *E.g. Idaho Metal Works v. Wirtz,* 383 U.S. 190, 205 (1966); *Mitchell v. Budd,* 350 U.S. at 477-80. For that reason, this Court in *Bayside* looked to the DOL's interpretation of § 3(f) in reviewing and upholding the NLRB's decision that truck drivers employed by integrated poultry companies to deliver feed to their contract farmers are not "agricultural laborers" exempt from coverage under NLRA § 2(3). *See* 429 U.S. at 303. By the same token, the Court followed the DOL's lead in *Maneja v. Waialua Agricultural Co.,* 349 U.S. 254, 260-63 (1955). There the DOL had determined that workers employed by a farmer who transported sugar cane grown by the farmer on its plantation to the farmer's processing plant on that same plantation—which the farmer used for the sole purpose of processing its own sugar cane—were agricultural employees under FLSA § 3(f). While reasonable minds could differ on that line-drawing exercise it is beyond question that the workers ties to a single farmer on a single farm put those workers in a distinctly different position than the live haul workers here.

> The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted. Thus, where such an employer other than the farmer performs certain work on a farm solely for himself in furtherance of his own enterprise, the practice cannot ordinarily be regarded as performed in connection with farming operations conducted on the farm. [29 CFR § 780.143.]

And, as we have emphasized, the live haul functions at issue here, though performed in large measure *on* the farm of the independent farmer, are not performed *by* the farmer or *for* the farmer's own benefit. To the contrary, those functions are performed *by* the integrated poultry company itself *for* the benefit of the company's processing activities. *See supra* at 6-10.

Indeed, 29 CFR § 780.143 provides the short but complete answer to the contention of petitioners and their *amici* that the Board's position on the status of live haul workers in the broiler chicken industry is contrary to congressional intent. *See* Brief for the Petitioners at 13-19; Brief of Amicus Curiae California Agricultural Labor Relations Board ("Cal. Agr. Bd. Br.") at 10-12, 14-19; Brief Amicus Curiae for the American Farm Bureau Federation, et al. ("Am. Farm Bur. Br.") at 16-18.

Petitioners' *amici* accurately identify the congressional intent underlying the "on a farm" language in FLSA § 3(f): *viz.*, to make it clear that where a *farmer* for his own economic benefit utilizes an independent contractor to assist the farmer in the performance of tasks that the farmer would otherwise be required to do through the farmer's own employees, the contractor's employees are not subject to the FLSA. *See* Cal. Agr. Bd. Br. at 10-12, 14-19; Am. Farm Bur. Br. at 16-18.[6]

[6] Petitioners do not advert to the congressional intent to benefit the farmer that underlies FLSA § 3(f)'s "on a farm" language. Rather, petitioners present lengthy excerpts from discussions on the Senate floor regarding the "on a farm" language, *see* Brief for the Petitioners at 15-19, as if those discussions support petitioners' position. In truth, those discussions only underscore the point that the intent of Congress was to protect the interests of the *farmer* in situations where the farmer finds it necessary for his own economic benefit to turn to outside contractors to perform tasks on his farm the farmer would otherwise do himself. Petitioners have pointed to nothing in the legislative materials that evince a broader or different congressional purpose, or that speak to the specific line-drawing problem presented in this case involving integrated poultry companies that perform work on a farm with the companies' own employees and equipment for the benefit of the companies' own nonfarming operations.

But the situation here, as the NLRB has recognized, does *not* involve the contracting out of work by farmers for the farmers' own economic benefit. In the vertically integrated poultry industry the contract farmer's role ends when the broilers have been raised to maturity. At that point those farmers have no tasks to contract out. The only issue here, it bears repeating, is the proper characterization of work performed by integrated poultry companies through the companies' own employees using the companies' own equipment "in furtherance of [the companies'] own [nonfarming] enterprise[s]." 29 CFR § 780.143.[7]

[7] Petitioners' reliance on DOL Regulation § 780.126, which cites approvingly to *Johnston v. Cotton Producers Ass'n*, 244 F.2d 553 (5th Cir. 1957), is misplaced. *See* Brief for the Petitioners at 27-28. The live haul functions in *Johnston* were performed by an independent retail supply store for the benefit of the store's "farmer customers," 244 F.2d at 554, and not by a vertically integrated poultry company for the benefit of the company's own non-farming processing operations. DOL Regulation § 780.126 and *Johnston* are thus entirely consistent with DOL Regulation § 780.143 and with the congressional intent underlying FLSA § 3(f).

The result reached by the Fifth Circuit in *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980), is, to be sure, in conflict with the principles stated in 29 CFR § 780.143, as well as with the consistently-held position of the NLRB and the decision of the Fourth Circuit below (although the *Coleman* case arose under the FLSA not the NLRA and the Fifth Circuit explicitly noted that no

E. In the face of all the foregoing, petitioners' last ditch argument is that the Board's determination in this matter is directly contrary to the "plain language" of § 3(f) of the FLSA, and on that account cannot stand. Brief for the Petitioners at 9, 12-13.

The plain statutory language in question states that "[a]griculture" includes activities "performed by a farmer or on a farm as an incident to or in conjunction with . . . farming operations." *Supra* n. 1, pp. 4-5. On its face—and as both the Department of Labor and the NLRB have recognized—the only thing plain is that § 3 (f) does *not* encompass all activity on a farm but only activity "incident to or in conjunction with farming operations" and does not settle with any plainness what is "incident to or [is] in conjunction with . . . farming operations" and what is incident to or is in conjunction with nonfarming operations.

That issue in the concrete setting of the vertically integrated poultry industry presents an occasion for line drawing by the Board in an area where Congress has not spoken directly to the "infinite variety of specific situations" that might arise in the application of FLSA § 3(f). *Gray v. Powell*, 314 U.S. 402, 412 (1941). "To determine upon which side of the median line the particular instance [in this case] falls calls for the expert, experienced judgment of those familiar with the industry." *Id.* at 413. As the *Bayside* Court recognized:

> Accordingly, regardless of how [this Court] might have resolved the question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply th[e] broad statutory language [in § 3(f)] to varying fact patterns requires enforcement of the Board's order. [429 U.S. at 304.]

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issue of appropriate deference to the NLRB was therefore presented, 629 F.2d at 1081 n.4). The *Coleman* Court, however, failed to even mention 29 CFR § 780.143, much less to deal with the economic realities in the vertically integrated broiler industry that bring this case squarely within the terms of that DOL regulation.

CONCLUSION

For the above stated reasons, and for the reasons set forth in the Brief for the Respondent Board, the judgment below should be affirmed.

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No. 95-210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF ARGUMENT

The National Labor Relations Board ("NLRB" or "Board"), in its brief, concedes that Holly's chicken catchers and forklift operators work "on a farm" within the meaning of §3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §203(f) (1978). NLRB Br. 18. Board counsel does not dispute that the chicken catchers and forklift operators perform "preparation for market"

and that the live haul drivers perform "delivery to market." NLRB Br. 21-22. Board counsel's sole position is that the activities of the live haul crew are not performed "as an incident to or in conjunction with" the farming operations of either Holly or the independent grower. Rather, according to the Board, the work of these employees is incidental to Holly's processing operations. NLRB Br. 22.

The Board's interpretation of the phrase "as an incident to or in conjunction with such farming operations" is highly artificial and contrary to the plain language of §3(f). Section 3(f) specifically defines "preparation for market" and "delivery to storage or to market" as activities that are *per se* incidental to farming.

Board counsel, however, argues that the farming operations of both Holly and the grower have ended at the time that the live haul crews perform their work. Thus, according to Board counsel, the chickens have no farmer, even though they have not been reduced to possession or delivered to market.

The absurdity of Board counsel's position is readily apparent and is contrary to the Court's decisions in *Mitchell v. Budd*, 350 U.S. 473, 481 (1956) and *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 260-262 (1955). The work of the chicken catchers and forklift operators begins and ends on the farm and results in no physical changes to the chickens. It constitutes "harvesting" in that it is the sole means by which the chickens are reduced to possession. Holly's processing operations, on the other hand, occur at a plant many miles away and result in a product that is sold in supermarkets.

In its efforts to prove that the independent grower ceases to be a farmer when the live haul crew arrives on the farm, Board counsel has effectively proved Holly's contention that it resumes its status as a farmer. Thus,

as Board counsel argues, the chickens are owned by Holly and the live haul functions are performed by Holly. Clearly, Holly has resumed its status as a farmer. Thus, the live haul employees satisfy the statutory definition of agricultural laborers. The Board's conclusion to the contrary is unreasonable and should be rejected.

ARGUMENT

I.

BOARD COUNSEL PROFFERS RATIONALES THAT ARE CONTRARY TO DECISIONS OF THE BOARD. THESE RATIONALES CANNOT BE USED TO SUSTAIN THE BOARD'S DECISION.

As was discussed in Holly's opening brief, the Board has historically read the "on a farm" language out of §3(f) by taking the position that if anyone other than the farmer performs a particular practice with regard to the farmer's agricultural commodities, that person is acting in furtherance of some separate business interest. Under the Board's view, no one, other than a farmer, can ever be exempt. Holly Opening Br. 24. The notion that only a farmer can perform secondary agricultural tasks has been reduced by the Board to a hornbook principle that the Board cites by rote. Thus, in this case, the sole justification offered by the Board to support its conclusion that Holly's live haul employees are not agricultural laborers is "that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks." J.A. 229.

In its brief, the Board's appellate counsel now concurs (as it must) with Holly's statement that "the legislative history clearly shows that 'Congress intended that the definition of an agricultural laborer would include nonfarmers so long as their work involved primary farming

activities or occurred on a farm and was incidental to the farming operations of the farm.' " NLRB Br. 24 (quoting Holly Br. 14-15). Thus, the Board now concedes that "wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm." NLRB Br. 23 (quoting *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 767 (1949)).

On its face, this concession would seem to also concede that the Board's decision is erroneous as its concerns Holly's chicken catchers and forklift operators. The Board's counsel, however, attempts to contain the damage flowing from this concession by arguing that Congress only intended to exempt employees of independent contractors who are in the " 'business of doing nothing but' providing chicken catching and transportation services."[1] (NLRB Br. 24). Section 3(f) contains no such limitation and no specific citation to the legislative history is given to support the Board's assertion. In fact, there is nothing in §3(f) or the legislative history that even remotely suggests that Congress was concerned about what other business interests, if any, the third party might have. Instead, Congress was interested in the nature of the work being performed. 81 Cong. Rec. 7888 (1937).

Board counsel's analysis of §3(f) and its legislative history cannot be found in any Board decision. The Court has made explicitly clear that "courts may not accept

[1] In footnote 11 of his brief, Board counsel attempts to further qualify this asserted limitation on §3(f). Thus, he states that if "the chicken catchers and forklift operators of an independent contractor were hired by a grower to cage and load chickens both raised and *owned* by the grower, the work of the chicken catchers and forklift operators *might* be [within the definition of agriculture]. NLRB Br. 28 (emphasis added). Board counsel's importation of an ownership requirement is not supported by the language of §3(f). His use of the word "might" demonstrates the extreme reluctance with which he makes the necessary concession.

appellate counsel's *post hoc* rationalizations for agency action. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) (citations omitted); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

What is more damaging to this *post hoc* analysis, however, is that it directly contradicts prior decisions of the NLRB. Thus, in *Produce Magic, Inc.*, 311 N.L.R.B. 1277 (1993), the Board held that employees of a "custom harvester," who was in the "business of doing nothing but" going to the farms of clients, packing lettuce grown on the farms into cartons, and loading the cartons onto trucks, were not engaged in secondary agriculture. The sole basis proffered to support this conclusion was that the lettuce was grown by the farmer rather than the employer. Clearly, if an agency decision cannot be upheld on the basis of a *post hoc* rationalization never considered by the agency, it cannot be upheld on the basis of a rationalization that is directly contrary to the agency's own decisions.

The fact that Board counsel felt compelled to resort to a *post hoc* rationale that was directly contrary to a prior Board decision is a strong indication that the Board's decision is not entitled to any deference. Indeed, as will be shown below, the Board's decision has no reasonable basis whatsoever.

II.
BOARD COUNSEL'S INTERPRETATION OF THE SECTION 3(f) DEFINITION OF SECONDARY AGRICULTURE IS ARTIFICIAL.

The Board, in its brief, makes the following significant concessions:

(1) Holly acts as a farmer in conducting its hatchery operations (NLRB Br. 21);

(2) Holly's pullet haulers, who catch pullets on the farms of independent growers and transport them to laying houses owned by other independent growers, and Holly's egg haulers, who transport eggs from the laying houses to Holly's hatcheries, are agricultural laborers (NLRB Br. 5 n.4);

(3) The independent growers, who raise the broiler chicks under contract with Holly, are farmers engaged in primary agriculture (NLRB Br. 18);

(4) Holly's chicken catchers and forklift operators work on the farms of the independent growers (NLRB Br. 18);

(5) Holly's chicken catchers and forklift operators perform "preparation for market" (NLRB Br. 21-22); and

(6) Holly's live haul drivers perform "delivery . . . to market" (NLRB Br. 21-22).

Despite these concessions, Board counsel takes the position that "the live haul crew's work falls outside Section 3(f) because it is not performed incidentally either to any primary farming operation by Holly Farms, or to the independent growers' operations." NLRB Br. 22. This position is based on an artificial reading of the phrase "as an incident to or in conjunction with such farming operations."

A. The Chickens Must Have A Farmer And The Only Two Choices Are Holly Or The Independent Growers.

The first difficulty with the interpretation of Board counsel is that it leads to the inevitable conclusion that the chickens, while still running loose on the farm, have no farmer. Under Board's counsel's view, at the precise

moment that Holly's live haul crew arrives at the farm, the independent grower ceases to be a farmer with respect to the chickens that he has raised. NLRB Br. 18. In addition, Holly assertedly ceased to be a farmer with respect to these same chickens when it turned them over to the farmer to be raised. NLRB Br. 16. Inasmuch as the Board does not suggest that anyone else is the farmer of these chickens, it follows that the chickens have no farmer.

The absurdity of this conclusion is obvious. Moreover, it constitutes a repudiation of the argument that the Board advanced in *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298 (1977). In *Bayside*, the Board took the position that "the owners of the farms are independent contractors rather than employees of Bayside and therefore the farming activity at these locations is attributable to them rather than Bayside." 429 U.S. at 302. Having prevailed on that issue in *Bayside*, the Board now contends that the catching and caging of the chickens on the farms of the growers is *not* attributable to the independent grower.

If the Board had held, as it did in *Bayside*, that the work of Holly's live haul crews was incidental to the independent growers' farming operations, this conclusion might be deemed reasonable. If the Board had held that the work of the live haul crews was incidental to Holly's farming operations, this conclusion would clearly be reasonable. What if cannot do is deny that these activities are incidental to anyone's farming operations.

The Board correctly notes that secondary practices must be incidental to "such" farming operations, *i.e.*, the farming operations of the farmer who performs the secondary practice or the farming operations of the farm on which the practices take place. NLRB Br. 14-15. In *Farmers Reservoir Co. v. McComb*, 337 U.S. 755, 766 n.15 (1949), the Court explained that "processing on a farm of commodities produced by other farmers is inci-

dental to or in conjunction with the farming operations of other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done." (citation omitted). Here, Holly's chicken catchers perform activities on chickens raised on the farms on which they perform their work. Furthermore, the chickens are owned by Holly. Thus, the "such" requirement of §3(f) is clearly satisfied.

Board counsel cites to a regulation of the Secretary of Labor, which states that "[t]he line between practices that are and those that are not performed 'as an incident to or in conjunction with' such farming operations is not susceptible of precise definition." NLRB Br. 28. While this may be true for certain types of activities, Congress, in enacting §3(f), specifically denominated certain activities, including "preparation for market" and "delivery to storage or to market," as activites that are incidental to or in conjunction with primary farming. Thus, the Board's contention that the live haul crew's work "is more accurately characterized as the first step of [Holly's] chicken-processing operation, rather than as the last step of the independent growers' primary farming operations" (NLRB Br. 19) is directly contrary to the express statutory language.[2]

As explained in Holly's opening brief, the statute does not require that the secondary practices be "solely" or

[2] In its brief, the Intervenor-Union cites to publications from the poultry industry which classify the live haul operations with processing operations. Union Br. 6-10. Inasmuch as this information was never presented to or relied upon by the Board, it cannot be used to sustain the Board's decision. *Chenery*, 332 U.S. at 196. Furthermore, the statutory definition of agriculture takes precedence over any classification scheme of the industry. Indeed, in the representation hearing, the Board rejected the contention that the live haul employees shared a community of interest with the processing plant employees. J.A. 35a.

"exclusively" incidental to farming operations. If that were the case, the independent wheat thresher cited in the legislative history would not be exempt because his employees would be acting in furtherance of the wheat thresher's separate business interests. The statute does not even require that the activities be "more" related to the farming operations than to some other operation. Holly Br. 23-24. All that is required is that the activities be fairly characterized as being incidental to the farming operations. *See Farmers Reservoir Co.*, 337 U.S. at 766 (work of irrigation company employees in supplying water to farmers, which farmers used to irrigate crops, "does constitute a practice performed as an incident to or in conjunction with farming").

Even if the statute required a comparison of all operations to which the secondary activites were incidental to determine which operation it was *most* incidental to, the Board's argument would still fail. Board counsel's efforts to characterize the activities of catching and caging chickens and delivering them to market as part of a "processing" or "slaughtering" operation is unpersuasive. Holly's processing operations take place at a separate location many miles from the farms and involve killing the chickens and performing a substantial number of operations that result in the ready to cook product that appears in the local supermarket. The activities of the live haul crew are not even remotely similar to the activities that occur at Holly's processing plant. The work of the chicken catchers and forklift operators begins and ends on the farms. These employees effectuate no physical changes whatsoever in the chickens. They merely reduce the chickens to possession and transport them to market.[3]

[3] Although, as the Board notes, Holly's live production manager testified that the catching and delivery of the chickens was the first step of the processing operation (NLRB Br. 20) this testimony

[footnote continued]

If the Board's analysis were adopted, it would logically follow that Holly's hatchery operations would be non-agricultural inasmuch as these operations are the "first step" in the processing of the chicken. Yet, the Board concedes, as it must, that Holly's hatchery employees are agricultural laborers.

B. The Work Of The Live Haul Crews Is Incidental To The Farming Operations Of Both Holly And The Independent Growers.

The Agreement between Holly and the independent growers, which is set out completely in the Appendix to the Board's brief, establishes their mutual relationship in raising the chickens. The Agreement states that Holly "is engaged in the production of poultry on an integrated basis, being responsible for the rearing of chickens from the breeder hens to the processing of the poultry into dressed product." NLRB Br., App. 1a. Although Holly retains "title to feed, chicks, and medication" at all times (NLRB Br., App. 8a), the independent grower uses his experience, skill, and knowledge "to supervise and direct

was given in the context of an inquiry into the "community of interest" between the live haul crews and the processing employees. Under §9(b) of the National Labor Relations Act, 29 U.S.C. §159(b), the Board employs a "community of interest" analysis in determining whether different groups of employees should be included within the same bargaining unit. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). At the Board's representation hearing, Holly's primary contention was that the live haul employees were exempt agricultural laborers. However, it made an alternative contention that, if the live haul employees were found to be statutory employees, they shared a community of interest with the processing plant employees and that the unit should include the processing plant employees. J.A. 35a. The Board, however found that the processing plant employees did *not* share a sufficient community of interest to warrant their inclusion in the bargaining unit. J.A. 39a. Thus, Board counsel is once again arguing contrary to the Board's own decision.

the efficient rearing of broilers." NLRB Br., App. 1a. Holly's employees actually do the catching and caging of the chickens on the farms of the grower. However, the Agreement requires the grower "[t]o be present during the catching or removal of the broilers." NLRB Br., App. 3a.

Clearly, the Board's position that neither Holly nor the independent grower is functioning as a farmer during the catching, caging, and delivery to market of these chickens is factually without support. In fact, both Holly and the grower have a vested interest in the chickens during this process, Holly because of its ownership interest and the independent grower because his pay is based largely on the total pounds of poultry grown.

In an effort to prove that the independent grower ceases to function as a farmer when Holly's live haul crew arrives at the farm, Board counsel makes the following argument:

> [T]he live haul crews' work involves property that belongs to petitioners, not the independent growers. Moreover, Holly Farms has not been retained by the independent growers to render the independent growers any service; rather, the growers have been hired by Holly Farms to perform a service for Holly Farms: raising the chicks to maturity. The live haul crews' work begins only after the independent growers' responsibilities have ended.

NLRB Br. 28 (footnote omitted). With the exception of the last sentence,[4] Holly agrees completely with these

[4]The contract requires the grower to be present during the catching process. NLRB Br., App. 3a. Moreover, a publication cited by the Union indicates that the grower's responsibilities continue during and after the catching and loading process. C. Parkhurst and G. Mountney. *Poultry Meat and Egg Production* 191 (Van Nostrand Reinhold Co. 1988).

factual assertions. What Board counsel has effectively done is prove Holly's contention that it resumes its status as a farmer when its live haul employees begin their work. Indeed, Board counsel states "it is 'highly significant' whether the practice involved property to which the farmer has title or for which the farmer otherwise has responsibility." NLRB Br. 27 (citing 29 C.F.R. §780.-143). If, as Board counsel asserts, the grower is no longer a farmer, then Holly, by necessity, must resume its status as a farmer.[5] Under §3(f), agriculture is not completed until the agricultural commodity is delivered to market or to storage for delivery to market. *See Mitchell v. Budd*, 350 U.S. 473, 481 (1956).

C. The Agricultural Exemption Does Not Turn On The Destination Of The Chickens.

In *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 260-262 (1955), the Court held that the employer's employees who transported workers to and from the fields and sugar cane from the fields to the employer's mill were agricultural laborers. Board counsel argues that the determinative facts in *Maneja* were that "the employer's mill, railroad tracks, and fields were all located on the employer's sugar plantation, and only cane grown in those fields was processed at the mill." NLRB Br. 18-19, n.8. The suggestion appears to be that had the mill been located off the plantation, the Court would have reached a different conclusion.

[5] Board counsel's assertion that even if Holly acts as a farmer in sending out its live haul crews, the live haul employees would still not be agricultural laborers (NLRB Br. 21), makes no sense. If Holly is acting as a farmer in catching, caging, and delivering its chickens to market, then its live haul employees are by definition acting incidentally to Holly's farming operations. Similarly, Holly does not comprehend Board counsel's assertion that even if the live haul employees act as an incident to farming operations, they do not act "in connection with" farming operations. NLRB Br. 28.

It is clear, however, that the Court's decision in *Maneja* was not based on the location of the mill. In fact, the Court pointed out that "had Waialua not owned a mill, its transportation activities from field to mill would come squarely within the agricultural exemption covering 'delivery to storage or to market or to carriers for transportation to market.'" 349 U.S. at 261. Obviously, the Court saw no difference between delivery to a mill on the employer's property and delivery to a mill located elsewhere.

The more fundamental point established by *Maneja*, which runs counter to the entire line of reasoning of Board counsel, is that the agricultural exemption does not turn on the ultimate destination of the agricultural product. Whether the market is the employer's processing plant, another person's processing plant, a wholesaler, a retailer, or the ultimate consumer is simply irrelevant. It is the nature of the employee's duties, not the destination of the product, that is determinative.

The position of Board counsel, however, is inalterably premised on the fact that the destination of Holly's chickens is Holly's processing plant. It is this fact, and this fact alone, on which Board counsel asserts that the activities of the live haul crew are incidental to Holly's processing operations. Indeed, Board counsel attempts to distinguish the Fifth Circuit's decision in *Johnston v. Cotton Producers Assn.*, 244 F.2d 553 (5th Cir. 1957), largely on the grounds that the employer of the employee who caught and cooped the chickens "had no use for the mature chicks" and the chickens "were delivered to third-party processors, not to the retail store." NLRB Br. 30. This distinction, which focuses solely on the destination of the chickens, is simply irrelevant.

In summary, Board counsel's analysis of the §3(f) definition of secondary agriculture is result-oriented and unpersuasive. Holly requests that the Court reject this analysis.

III.
HOLLY DID NOT WAIVE ITS CONTENTION THAT ITS CHICKEN CATCHERS AND FORKLIFT OPERATORS ARE ENGAGED IN PRIMARY AGRICULTURE.

The Board argues that Holly waived its contention that its chicken catchers and forklift operators are engaged in "primary agriculture" by allegedly not raising it before the Board or the court of appeals. NLRB Br. 31-32. This contention is without merit.

Section 10(e) of the Act, 29 U.S.C. §160(e), provides, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." In *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986), the Ninth Circuit explained §10(e) as follows:

> Congress enacted section 10(e) to ensure that the NLRB has an opportunity to apply its special expertise to an issue before that issue is presented to an appellate court. . . . Section 10(e) bars judicial review when no objection has been filed, . . . , or when only an ambiguous, general objection to the decision has been filed. . . . However, an objection will meet the statutory requirement if it is not "so ambiguous as to be totally ineffective to adequately apprise the Board" that the issue is disputed.

Id. at 713 (citations omitted). Section 10(e) requires "notice of objection." It does not require "briefing and argument before the Board." *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1192 (D.C. Cir. 1984).

Throughout this proceeding Holly has consistently and repeatedly argued that the live haul employees are exempt agricultural laborers and cannot properly be included in a bargaining unit. On March 14, 1989, the Board held a representation hearing to determine the scope of the appropriate bargaining unit. At this hearing, counsel for Holly stated on the record that it was Holly's position that all of the employees in the requested unit "are exempt from the coverage of the National Labor Relations Act as being agricultural employees within the provisions of the Fair Labor Standards Act." Rep. Hearing at 10.

On March 27, 1989, the Board's Regional Director issued a Decision and Order dismissing the Petition. J.A. 17a-23a. The Union subsequently filed a Request for Review with the Board. The Regional Director treated it as a motion for reconsideration and reopened the hearing for further evidence. Subsequently, on June 20, 1989, the Regional Director issued a Supplemental Decision in which he found that Holly's hatchery employees were exempt agricultural laborers, but that the live haul employees were not agricultural laborers. J.A. 33a-42a.

On or about April 7, 1989, Holly filed with the Board a Request for Review and Stay of Election. In this Request, Holly's counsel stated:

> The Regional Director also erred in his original order wherein he concluded that "the live haul employees, designated as chicken catchers, who work out of the processing plant . . . [are] not included either in the primary or secondary definition of "agriculture" in section 3(f) of the FLSA." (Decision and Order p. 2).

Request for Review pp. 3-4. Holly contended in this Request that all of the live haul employees were agricultural laborers under the prevailing precedents.

On July 20, 1989 the Board issued its Decision on Review and Order in which it denied Holly's Request for Review. J.A. 43a-45a. This Decision was not a final order and was not immediately appealable. However, in the ensuing unfair labor practice case, Holly continued to

press its contention that the live haul employees were exempt agricultural laborers. In the ALJ's Decision, issued on March 12, 1992, the ALJ stated:

> The Respondents maintain, as they have during the course of Case 11-RC-5583, that the live haul employees cannot appropriately be included in a Board-found bargaining unit because they are agricultural workers, exempt under Section 2(3) of the Act. . . .
>
> I, of course, am bound by the Board's prior determination that the unit as described is appropriate.

Pet. App. 786-787.

Holly filed timely exceptions to the ALJ's Decision. These exceptions specifically challenged the ALJ's conclusion that the live haul unit was an appropriate bargaining unit. Respondents' Exceptions, nos. 119, 487, 549(w). The Board majority, however, declined to reconsider "the Board's prior determination in the representation case that the live haul workers are statutory employees." Pet. App. 83.

Clearly, the Board was repeatedly placed on notice of Holly's position that the live haul employees were exempt agricultural laborers within the meaning of §3(f) of the FLSA. This is all that was required under §10(e) of the NLRA.

In its brief to the Fourth Circuit, Holly continued to press its contention that the live haul employees were exempt agricultural laborers. Holly discussed §3(f) in detail and the various precedents interpreting §3(f). Although Holly discussed the secondary branch of agriculture in greater detail[6], at no point did Holly suggest

[6]This was the result of the fact that most of the cases dealing with live haul crews have focused on the secondary branch of

[footnote continued]

or concede that the chicken catchers and forklift operators were not engaged in primary agriculture. Indeed, Holly pointed out that "[r]egardless of whether a particular practice constitutes 'primary' farming or 'secondary' farming, the legal effect is the same: Individuals engaged in such employment are not employees under the Act." Br. at 11.

In the petition for certiorari, Holly contended that "Holly's chicken catchers, forklift drivers, and live-haul drivers clearly come within the scope of the agricultural exemption." Pet. 63. Holly did not limit this contention to either primary or secondary agriculture.

The Board's contention that Holly waived the "primary" agriculture issue is without merit. Holly repeatedly advised the Board and the court of appeals of its contention that the live haul employees were exempt agricultural laborers within the meaning of §3(f). The position of Board counsel that Holly had some sort of obligation to argue more forcefully the primary agriculture issue is without merit. Holly argued the applicability of §3(f), which includes both the primary and secondary branches of agriculture.[7] That was sufficient to preserve its position.

§3(f). *E.g., Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980); *Johnston v. Cotton Producers Assoc.*, 244 F.2d 553 (5th Cir. 1957).

[7]Significantly, §3(f) does not contain the words "primary" or "secondary." These classifications were developed by the Court in *Farmers Reservoir.*

IV.
BOARD COUNSEL'S INTERPRETATION OF PRIMARY FARMING IS INCONSISTENT WITH THE STATUTE.

Board counsel argues that the term "harvesting," as used in §3(f), is limited to crops and that chickens can be raised but cannot be harvested. This contention is based on the fact that §3(f) first speaks of "the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities" and then speaks of "the raising of livestock, bees, fur-bearing animals, or poultry." According to Board counsel, the second phrase is superfluous if animals can be harvested. NLRB Br. 33.

This contention is unfounded. Section 3(f) specifically mentions harvesting of "any" agricultural commodity. Chickens are clearly an agricultural commodity. 29 C.F.R. §780.112. The term "raising of . . . poultry" speaks to the process of feeding and caring for chickens, functions that are analytically distinct from "harvesting." Thus, §3(f) includes both the raising of poultry and the harvesting of any agricultural commodity. The first phrase does not render the second phrase superfluous. Furthermore, having clearly stated that any agricultural commodity could be "harvested," there was no need for Congress to repeat this term when it exempted the "raising of . . . poultry."

Although Board counsel candidly admits that Holly's interpretation of the Secretary of Labor's regulations is "plausible in isolation," (NLRB. Br. 34), he contends that this interpretation is nevertheless inaccurate. Board counsel does not appear to dispute that the Secretary of Labor has indicated that harvesting extends to the "actual process whereby agricultural commodities are . . . reduced to possession" and to "transportation to a concentration point on the farm." 29 C.F.R. §780.118(b).

Rather, Board counsel points to language at the beginning of the regulation and argues that this language forecloses the primary farming argument. The language relied upon states that harvesting "includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position." 29 C.F.R. §780.118(a). From this language, the Board argues that only crops, and not chickens, may be harvested.

Holly readily concedes that harvesting "includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position." 29 C.F.R. §780.118(a). In addition, however, harvesting includes the "actual process whereby agricultural commodities are . . . reduced to possession" and "transportation to a concentration point on the farm." 29 C.F.R. §780.118(b). The fact that harvesting "includes" activities regarding crops does not preclude it from applying to chickens. Indeed, Board counsel concedes that fish can be harvested. NLRB Br. 34 (citing *Domsea Farms, Inc.* 211 N.L.R.B. 832 (1974); 29 C.F.R. §780.109). It is illogical that the harvesting of fish, a non-crop agricultural commodity not even mentioned in §3(f), constitutes primary agriculture, but the harvesting of poultry, an agricultural commodity specifically mentioned in §3(f), does not constitute either primary or secondary agriculture.

CONCLUSION

The Board's conclusion that Holly's live haul crews do not satisfy the statutory definition of either primary or secondary agriculture is irrational and is not entitled to deference. Holly respectfully requests that the Court reverse the decision of the Fourth Circuit on this issue.

Dated this 14th day of February 1996.

Respectfully submitted,

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(10)

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In The

Supreme Court of the United States

October Term, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCALS 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Intervenor.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The California Agricultural Labor Relations Board (ALRB) hereby submits a brief pursuant to Supreme Court Rule 37.3 in support of Petitioners, Holly Farms Corporation and Tyson Foods, Inc. All parties have consented to the ALRB's participation as amicus curiae. Letters evidencing such consent are on file with the Clerk of the Court.

The ALRB, which is closely modeled on the National Labor Relations Board (NLRB), is the entity created under the laws of the State of California to administer the Agricultural Labor Relations Act (ALRA) (California Labor Code § 1140 et seq.). The ALRA extends to agricultural employees in California, who are specifically excluded from the NLRB's jurisdiction (29 U.S.C. § 152(3)), the same rights granted to employees in other industries under the National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). The ALRB, like the NLRB, is bound by the definition of agriculture contained in section 3(f) (29 U.S.C. § 203(f)) of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201, et seq.). Moreover, California Labor Code section 1140.4(b) limits the jurisdiction of the ALRB to employees excluded from the coverage of the NLRA. Due to the impact of federal preemption principles, the boundaries of the ALRB's jurisdiction are therefore controlled by the NLRB's interpretation of the NLRA's agricultural exemption. As a result, the ALRB and the State of California have a substantial interest in the NLRB's decisions defining agriculture.

The case before the Court is but one example of the NLRB improperly asserting jurisdiction over agricultural employees by ignoring the plain meaning of the language of section 3(f) of the FLSA, in particular, that portion which defines secondary agriculture as various practices "performed by a farmer *or on a farm*." (Emphasis added.) This problem is not confined to cases involving integrated poultry operations. By reading the "on the farm" component of 3(f) out of the definition of secondary agriculture, the NLRB has asserted jurisdiction over practices performed "on a farm" in the vegetable industry of California.

By narrowing the NLRA's agricultural exemption in defiance of the dictates of Congress as expressed in the annual rider to its appropriations acts, the NLRB has intruded into an area intentionally left to the states. Every time that the NLRB alters the scope of the NLRA's agricultural exemption, the effect in California is a shift in the jurisdiction of the ALRB and the consequent disruption of the administration of the ALRA and of bargaining relationships created thereunder. Where, such as here, the NLRB acts in defiance of the limits placed on it by Congress, such action also constitutes an indefensible intrusion into the jurisdictional realm left to the states.

SUMMARY OF ARGUMENT

In pertinent part, section 3(f) of the FLSA provides that what is known as "secondary agriculture" includes "any practices . . . performed by a farmer or on a farm as

an incident to or in conjunction with such farming operations. . . ." The plain language of this provision, as well as the legislative history and prior decisions of this Court, establish the independent significance of the phrase "or on a farm." Thus, work which is incident to a farming operation may be considered within the definition of secondary agriculture by virtue of being performed on a farm, regardless of whether the employees in question are employed by a farmer.[1] In spite of this unequivocal authority, the NLRB has, in this case and others, expressed the clearly erroneous view that employees cannot be engaged in secondary agriculture unless their employer is a farmer.

The legislative history of the FLSA demonstrates that the phrase "on the farm" was added to satisfy the concern of some senators that a definition of so-called "secondary agriculture" which was contingent upon the practices in question being performed by "farmers" would have the effect of leaving essential farming practices outside the scope of the exemption if a farmer hired others to perform them.

The legislative history further indicates that Congress was concerned with the competitive disadvantage of small farmers who could not afford the equipment and

[1] The argument contained herein is based solely on the view that the work of the live-haul crews falls within the NLRA's agricultural exemption because such work takes place on a farm and is incident to or in conjunction with that farming operation. The question of whether Holly Farms may be considered a farmer will not be addressed.

facilities necessary to prepare and deliver their raw agricultural products to market, and who would instead have to contract for such services with outside entities subject to the wage and hour provisions of the proposed bill. To address this concern, the words "or on a farm" and "including delivery to market" were added to ensure that the exemption for agriculture would cover all work, even if performed instead by an outside entity, that a farmer might naturally perform himself in order to get his raw agricultural products to market. There is no indication in the language of section 3(f) or in the legislative history that the size or nature of the outside entity is of any relevance. In addition, the inclusion of such work within the definition of secondary agriculture is supported by the interpretation of the courts and the Department of Labor.

The chicken catchers and forklift drivers at issue in this case indisputably perform their duties on a farm. Their work, which involves gathering the chickens and preparing them for delivery to market, is incident to and in conjunction with the contract growers' farming operations. The language of section 3(f) expressly includes preparation for and delivery to market as examples of activities that fall within secondary agriculture. Moreover, the nature of the work itself, rather than the nature of the business of the employer, is the proper focus. In this case, the work of the employees in question is unquestionably more closely related to the poultry raising activities on the farms of the contract growers than to the slaughtering operations of Holly Farms.

For the most part the work of the live-haul drivers takes place not on a farm but on public roads. However,

the work of the live-haul drivers originates on a farm and constitutes "delivery to market." Since the legislative history indicates that all labor performed in making delivery to market was intended to be swept within the definition of agriculture in section 3(f), the live-haul drivers are appropriately included within the agricultural exemption.

ARGUMENT

I

BY IGNORING THE PHRASE "OR ON A FARM," THE NLRB HAS REFUSED TO FOLLOW THE DICTATE OF CONGRESS THAT IT ADHERE TO THE LANGUAGE OF SECTION 3(f) OF THE FLSA DEFINING THE AGRICULTURAL EXEMPTION

Section 3(f) of the FLSA defines agriculture as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to

> storage or to market or to carriers for transportation to market.

The portion of the definition referring to what is known as secondary agriculture begins with the phrase "and any practices . . . performed by a farmer *or on a farm.*" (Emphasis added.) Basic canons of statutory construction dictate that the latter portion of this disjunctive phrase may not be ignored. See, e.g., 2A Sutherland, Statutory Construction (5th ed. 1992) § 46.06, pp. 119-120. Legislative history and subsequent case law confirm the independent significance of the phrase.

In *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 767 (1949), a case often cited for its explanation of the distinctions between primary and secondary agriculture, this Court construed section 3(f) of the FLSA in a manner which should have eliminated all doubt as to the independent legal significance of the phrase "or on a farm." The Court summarized the legislative history of the phrase "by a farmer or on a farm" as follows:

> This language was carefully considered by Congress. As originally introduced, the exemption covered such practices only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. To take care of that situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work

> was incidental to farming and was done on the farm.

Id. at 337 U.S. 767. As part of the same amendment that added the words "or on a farm," was the addition of language providing that all labor involving delivery to market would also fall within the definition of agriculture. 81 Cong. Rec. 7888 (1937).

More recently, the Court of Appeals for the Third Circuit followed the analysis of *Farmers Reservoir & Irrigation Co.* in finding that those who worked for a company that removed spent compost from mushroom growing operations fell within the agricultural exemption of section 3(f):

> Marrero's 'take-out' operation, although not performed 'by a farmer', is conducted 'on a farm' since the shoveling of the spent compost from the mushroom beds onto the conveyor belts takes place in the mushroom houses, and Marrero has not suggested that mushroom houses should not be treated as farms. (citations omitted) The removal of spent compost is 'incident to or in conjunction with' mushroom farming because the removal of spent compost is an integral step in the mushroom growing process; the mushroom beds cannot be made ready for the next crop until the removal is complete.

Donovan v. *Marrero*, 695 F.2d 791, 795 (3d Cir. 1982). The Department of Labor, as expressed in its regulations on the scope of secondary agriculture, unequivocally recognizes that the agricultural exemption applies to employees who work on a farm but not for a farmer, as long as the work is incident to or in conjunction with the

farming operations of the farm on which they are working. 29 C.F.R. §§ 780.128, 780.129.

Despite the plain language of section 3(f) of the FLSA and the weight of authority which establishes the independent significance of the phrase "or on a farm," the NLRB has simply ignored this portion of the definition of agriculture. In the underlying representation decision in the present case, the NLRB's analysis with regard to the live-haul employees consists of the following passage:

> As to the live haul employees . . . their position is not included either in the primary or secondary definition of "agriculture" in Section 3(f) of the FLSA. In this connection, the Board has consistently held that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks.

Brf. for the NLRB in Opp. to Pet. for Writ of Cert., App. 4a-5a.

The above passage illustrates that the NLRB's analysis is limited to the question of whether the employer is acting *as a farmer* with regard to the work assigned to the employees in question. There is no discussion of, or recognition of, the fact that the employees work on a farm and that such work is incident to or in conjunction with the farming operations on that farm. As will be illustrated below, the work of the live-haul crews falls within the definition of secondary agriculture.

The NLRB's truncated analytical framework is not peculiar to the present case or to cases involving integrated poultry operations. In *Produce Magic, Inc.*, 311

NLRB No. 173 (1993), a case originating in California and involving the harvesting and field packing of row crops by a custom harvester,[2] the NLRB made the same fundamental analytical error. After determining that the employees were engaged in primary agriculture only to the extent that they are actually severing the crops from the ground, the NLRB then considered whether the additional work involved in field packing, namely, placing heads of lettuce in plastic and putting them in cartons, constituted secondary agriculture. On page 7 of Regional Director's decision adopted by the NLRB, he states:

> The record in the instant proceeding reveals that the Employer does not cultivate any crops but instead provides harvesting and other services either to a grower or pursuant to 'joint deals.' Inasmuch as the lettuce handled by the workers in issue herein is not grown by the Employer, I find that the handling of that lettuce does not constitute secondary agriculture.

As the above passage indicates, the NLRB's analysis of secondary agriculture begins and ends with a determination as to whether the employer is a farmer. The NLRB's analysis fails to recognize that "such farming operations" relates back to both practices performed by a farmer and practices performed on a farm. The effective result is that the NLRB has changed the wording of section 3(f) from "incident to or in conjunction with such farming operations" to "incident to or in conjunction with *the employer's farming operations.*" This is despite the fact

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[2] A custom harvester acts principally as a provider of labor, but also provides other services such as the use of specialized equipment and transportation of the crop to market.

that the custom harvester in the *Produce Magic* case provided a service analogous to that provided by the threshing companies that were used as examples of the type of nonfarmer entities whose employees were intended to be swept within the definition of agriculture by the addition of the phrase "or on a farm." 81 Cong. Rec. 7653 (1937). In other words, the custom harvester was organized solely for the purpose of going from farm to farm to provide services to farmers that farmers would otherwise normally do with their own employees as a natural part of the farming process culminating with delivery to market.

In fact, the legislative history indicates that the intent was to cover within the definition of agriculture not just the employees of threshing companies, but the employees of all nonfarmer entities that come on a farm to provide a service that the farmer might ordinarily do himself as an integral part of the farming operation. The following colloquy concerning the "on the farm" amendment, which begins with Senator George disagreeing with Senator Black's earlier comment that the original bill was adequate to meet his concerns, is instructive:

> Mr. GEORGE. I am sure it does not in fact do so because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases, have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

> Mr. BLACK. Unquestionably.
>
> Mr. McGILL. I may say to the Senator from Georgia and other senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.
>
> Mr. GEORGE. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?
>
> Mr. McGILL. That is true; and the language would also include all the labor performed in making delivery to market.

81 Cong. Rec. 7888 (1937).

The ALRB participated as amicus curiae before the NLRB in the *Produce Magic* case and alerted the NLRB to the omission of any analysis concerning the "on the farm" portion of the definition of secondary agriculture. In both its original decision and in a subsequent denial of the ALRB's Motion for Reconsideration (reported at 318 NLRB No. 125 (1995)), the NLRB refused even to address the "on the farm" issue. This illustrates the fact that the error committed by the NLRB in the case now before the Court is intentional and systematic and has nationwide implications. The effect is particularly acute in a state like California, which has chosen to fill the void left by Congress and provide collective bargaining rights to its vast number of farm workers.[3] The uncertainty and disruption

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[3] The logic of the NLRB's improperly restrictive interpretation of agriculture would exclude labor contractors providing services on farms, since such entities are normally not farmers and, by definition, the farms on which they contract to provide

of existing bargaining relationships under the ALRA created by the NLRB's improper narrowing of the agricultural exemption carries potential adverse effects not only for farm workers, but for the business interests of growers as well.

II

THE CHICKEN CATCHERS AND FORKLIFT DRIVERS IN THE PRESENT CASE ARE UNQUESTIONABLY ENGAGED IN SECONDARY AGRICULTURE

It is undisputed that the work of the chicken catchers and the forklift drivers is performed on a farm. It is also apparent that their work, which involves gathering the chickens and preparing them for delivery to market,[4] is incidental to and in conjunction with the contract growers' farming operations. This is not only because such work falls within any common sense definition of the raising of poultry, but because the language of section 3(f) expressly includes preparation for and delivery to

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labor are not their own. This creates a particularly acute problem in administering the ALRA in California because, while the labor contractor would be considered the employer under the NLRA, under the ALRA the farmer engaging the labor contractor is deemed to be the employer. California Labor Code § 1140.4(c). In other words, this attempt by California to assign the bargaining obligation to the most stable and responsible party is rendered a nullity by the NLRB's interpretation of section 3(f).

[4] The farmer's "market" is normally the wholesaler, processor, or distributing agency to which the farmer delivers his products. 29 C.F.R. § 780.150. In this case, the contract growers' market is Holly Farms' processing facility.

market as examples of activities that fall within secondary agriculture. This truly unremarkable conclusion is confirmed by subsequent interpretation by the courts and the Department of Labor.

In its interpretive regulations, the Department of Labor states that the employees of a poultry processor who perform work on a farm of an independent grower as an incident to or in conjunction with the raising of poultry on the farm are employed in secondary agriculture, and that the cooping and loading of poultry are examples of such practices. 29 C.F.R. §§ 780.126, 780.151. In *Johnston* v. *Cotton Producers Association*, 244 F.2d 553 (5th Cir. 1957), the employee at issue was employed by a rural supply store, found to be a retail establishment, which had contractual arrangements with growers of chickens. A large portion of the employee's duties involved catching and cooping the chickens on the various farms and loading them on trucks for transport to processing plants. Citing the fact that this work was performed on a farm and involved preparation for and delivery to market, the court found it to be within the definition of agriculture.

As explained above, the NLRB itself has simply ignored the "on the farm" portion of section 3(f). The only known explanation by the NLRB of the operation of this language consists of the post hoc analysis of counsel for the NLRB contained in the NLRB's Brief in Opposition to the Petition for Writ of Certiorari. This analysis is inconsistent with both the plain language of section 3(f) and the pertinent legislative history, and is otherwise unavailing.

Counsel for the NLRB has argued that Congress meant only to exempt from FLSA coverage the employees of specialized independent contractors, such as threshing companies, who make a business of going from farm to farm and doing nothing but that single function. Brf. for the NLRB in Opp. to Pet. for Writ of Cert., p. 24. Under this analysis, it is asserted that Holly Farms does not fall within this category of businesses because its business does not consist solely of providing chicken-catching and hauling services to farmers.

First and foremost, the language of section 3(f) contains no such limitation. Moreover, this post hoc justification for the NLRB's decision in this case is at best disingenuous in light of *Produce Magic*. There, of course, the NLRB held that the employees of a custom harvester, who *does* make a business of going from farm to farm providing a specialized service to farmers, were not engaged in agriculture *only* because their employer was not a farmer.

Most importantly, there is absolutely no basis for asserting that Congress intended to restrict the reach of the agricultural exemption in such a manner. The threshing company was simply used as an example in the debates of a nonfarmer entity whose employees should be included in the agricultural exemption while working on a farm.[5] The motivation for the "on the farm" amendment was to protect the competitiveness of small farmers

[5] To put this in perspective, under the NLRB's analysis, if a wheat threshing service was provided not by a company that only performed threshing but by a company which owned a flour mill to which the threshed grain would be delivered, the work of the threshing crew would not be agricultural. There is

who did not have the equipment and facilities to perform themselves farming tasks that larger, more diverse farming entities could do themselves. 81 Cong Rec. 7657, 7659-7660.[6] Since so called secondary tasks performed by the large diversified agricultural operations would have fallen within the exemption as originally drafted because they would be performed by a farmer, the concern was that higher costs would be passed through to small farmers who would have to contract for those functions with outside entities whose employees would not be within the exemption (and therefore subject to the bill providing for a minimum wage and restrictions on hours of work).

To attempt to minimize this problem, it was decided to exempt the employees of such outside entities when they worked on a farm. The size or nature of the outside entity, i.e., whether it is organized only to provide a single service to various farmers, or is part of a larger or more diversified company, was immaterial to the motivation of Congress. This is because the motivation was to reduce costs to the small farmers, even though the mechanism was to do so indirectly by reducing labor costs to the outside entities providing services to small farmers. Therefore, the proper focus is on the nature of the work performed on the farm, not on who performs it. This is

no indication whatsoever that Congress intended such a distinction.

[6] While some senators originally sought to include within the exemption various processing functions small farmers contracted to have performed off the farm by nonfarmers, the eventual compromise was the amendment adding "or on a farm" and "delivery to market."

illustrated by the following passages from the Congressional debates.

After Senator McAdoo expressed the fear that the amendment adding "on the farm" and "delivery to market" would not cover agricultural cooperatives common in California, Senator McGill replied:

> Mr. McGILL: Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting . . . the words "on a farm", and also by . . . including delivery to market, it being the purpose of the amendment to exclude from the bill, all labor performed on a farm, whether by contract or otherwise, and to exclude all labor connected with the delivery to market of commodities produced on a farm.
>
> Mr. McADOO: I do not think it is sufficiently broad. I may say to the Senator from Kansas so much of the preparation of our crops in California is through farm labor cooperatives that the alterations made which have been made in the amendments I think do not widen it as much as needed.
>
> * * *
>
> Mr. McGILL: . . . I will state that I feel that the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday, such as mentioning harvesting, packing, and operations of that character. The amendment adopted yesterday was intended to include, and I think does include, all kinds of labor performed on a farm, and all kinds of

> labor in connection with delivering agricultural products to market.

81 Cong. Rec. 7927-7928 (1937). After Senator Pepper interjected briefly to persuade McAdoo to preserve the "liberal amendment inserted yesterday," McAdoo reiterates that his concern is to include the work performed by cooperatives in California. Senator George then replied that the nature of the entity performing the work is irrelevant to the amendment, which clearly includes the kind of services McAdoo sought to include:

> Mr. GEORGE: I suggest to the Senator from California that, in my opinion, the amendment offered by the Senator from Kansas is broader than his amendment, because it will take care of all operations, whether performed by cooperatives or persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is stated as a broad general proposition.

81 Cong. Rec. 7928 (1937).

Counsel for the NLRB also has offered the post hoc justification that the work of the live-haul crews does not fall within secondary agriculture because it is incident not to the contract growers' farming operations but to Holly Farms' poultry slaughtering operations. Brf. for the NLRB in Opp. to Pet. for Writ of Cert., p. 23. This is based on the assertion that the function of raising chickens ceases at the moment that the chickens reach maturity. This assertion by the NLRB is belied by both the plain language of section 3(f) and the underlying legislative

history. Its connection to common sense is tenuous as well.

The work of the chicken catchers and forklift drivers falls squarely within "preparation for market," which is one of the examples expressly included in section 3(f) as an activity that is "incident to or in conjunction with" farming operations. Moreover, as explained above, the legislative history reflects the intent of Congress that the agricultural exemption would encompass all activities contracted to be done by an outside entity that a farmer would otherwise normally perform himself in order to get his raw agricultural product to market. 81 Cong. Rec. 7653, 7657-7660, 7888 (1937). In this case, the live-haul crews are performing just such a task by preparing the raw agricultural product of the farms, live chickens, to be transported to market.

A key principle that is missing from the NLRB's analysis is that the inquiry must focus on the work actually performed by the employees, not on the business of their employer. *McLeod* v. *Threlkeld*, 319 U.S. 491, 497 (1943); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303 (197?); *Johnston* v. *Cotton Producers Association, supra*, 244 F.2d at 555. Thus, while the live-haul crews are employed by a slaughtering operation, the salient point is that the work they perform is an ordinary part of the operation of a chicken farm. The absurdity of the NLRB's claim that the farming operation ceases when the chicks have reached maturity is apparent when the even more absurd but logically necessary conclusion is drawn that the slaughtering operation begins at the moment on the farm when the chicks reach maturity.

Indeed, it may be said that the gathering of the chickens for transport is a necessary precursor to slaughter and is thus related to the slaughtering operation. But whenever an outside entity performs agricultural services on the farm of another, that work is obviously related in some manner to the outside entity's business interests. What must be determined is whether the work itself is of a character which is more naturally a part of the farming operation where it takes place or of the business of the employer. This is the teaching of *Bayside Enterprises, Inc., supra*, 429 U.S. 298, for the trucking of poultry feed involved in that case was found to be more logically a part of the nonagricultural feedmill operation of the employer than of the farming operations to which the feed was delivered. In contrast, it appears that the approach adopted by the NLRB is simply to inquire whether the work has any relation to the employer's business. Since there is by definition always some relation to the employer's business, such an approach would never result in finding on the farm work performed for a nonfarmer employer to constitute secondary agriculture. Consequently, such an approach is in reality no different from ignoring the phrase "or on a farm" altogether, for it would make the phrase meaningless.

III

THE LEGISLATIVE HISTORY INDICATES THAT WORK OF THE TYPE PERFORMED BY THE LIVE-HAUL DRIVERS WAS INTENDED TO FALL WITHIN THE DEFINITION OF AGRICULTURE

The work of the live-haul drivers arguably may be differentiated from that of the chicken catchers and forklift drivers, in that for the most part the work of the live-

haul drivers takes place on public roads rather than on a farm. However, the legislative history indicates that such work was intended to be swept within the definition of agriculture in section 3(f) because it constitutes "delivery to market."

As discussed above, the debates reflect that Congress was concerned that small farmers who could not afford the equipment and facilities necessary to prepare and deliver their raw agricultural products to market would be put at a competitive disadvantage by having to contract with outside entities who were subject to the proposed wage and hour provisions of the FLSA. The amendment agreed to in an effort to resolve this concern added the words "or on a farm" and "including delivery to market." 81 Cong. Rec. 7888 (1937).

While some senators desired an even broader definition of agriculture, the language of the agreed upon amendment accomplished two main purposes. The "or on a farm" phrase ensured that labor ordinarily performed as part of a farming operation would be exempt even if the farmer arranged for another entity to perform the work. The "delivery to market" language established the ending point of what constitutes "agriculture."

Thus, whether done by a farmer or not, agriculture was to extend until the raw agricultural products reached market. While delivery to market normally involves going off the farm, the key is that it originates on the farm. The breadth of the "delivery to market" phrase is indicated in Senator McGill's assurance to his colleagues that the language of the amendment "would also include all labor performed in making delivery to market." 81

Cong. Rec. 7888 (1937). Therefore, in light of legislative intent, the work of the live-haul drivers should fall within the definition of secondary agriculture.

CONCLUSION

The NLRB has, in this and other cases, improperly narrowed the definition of "agriculture" in section 3(f) of the FLSA, in defiance of the dictate of Congress that such definition be utilized in determining the parameters of the "agricultural laborer" exemption in the NLRA. The NLRB has done this by ignoring the legally significant phrase "or on a farm" and/or by interpreting the phrase "incident to or in conjunction with" in a manner which creates the same result. This fundamental analytical error has resulted in this case in the unlawful assertion of jurisdiction over agricultural employees, namely, the live-haul crews. In other cases and in other states, this same analytical error has resulted and will continue to result in the expansion of NLRB jurisdiction in excess of the authority conferred on it by Congress.

Should the agricultural exemption in the NLRA, as defined by section 3(f) of the FLSA, no longer be appropriate, in whole or in part, in light of the organization and character of modern agriculture, that is a matter for the consideration of Congress, not the NLRB. Until Congress decides otherwise, the exemption continues and the governing language of section 3(f) must be respected. The NLRB cannot be allowed to continue to peck away at the exemption until it is a virtual nullity. Unless this Court clearly directs the NLRB to adhere to the limits of its

authority, the result will be continued confusion and disruption in labor relations, particularly where, as in California, a state has stepped in to regulate an area Congress has thus far seen fit to leave to the states.

DATED: December 19, 1995

Respectfully submitted,

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No. 95-210

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In the Supreme Court of the United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE AMERICAN FARM BUREAU FEDERATION, THE ALABAMA FARM BUREAU FEDERATION, THE NORTH CAROLINA FARM BUREAU FEDERATION, AND THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit

Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico, including *amici* Alabama Farm Bureau and North Carolina Farm Bureau (collectively, with AFBF, "Farm Bureau"), representing more than 4.5 million member families. Farm Bureau first expressed its long-standing interest in the proper construction of § 3(f) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 203(f), to this Court as *amicus curiae* in *Maneja* v. *Waialua Agric. Co.*, 349 U.S. 254, 256 (1955).

The North Carolina Farm Bureau is a non-profit corporation, organized and domiciled in North Carolina, with its principal office located in Raleigh, North Carolina. North Carolina Farm Bureau is North Carolina's largest general farm organization with a voluntary membership of over 374,000 families. The organization is dedicated to improving the quality of life for North Carolina's farmers and rural residents, including the increase of net farm income.

The Alabama Farm Bureau is a non-profit corporation organized and domiciled in Alabama, with its principal office located in Cullman, Alabama. It represents 3,000 member families. The purposes of the Alabama Farm Bureau are to promote, protect and represent the business, economic, social and educational interests of the family farm in Alabama. It works toward the betterment of conditions of persons engaged in agricultural pursuits, the improvement of the grade of agricultural products, and the development of a higher degree of proficiency in agriculture.

The National Council of Agricultural Employers is a Washington, D.C.-based association representing growers and agricultural organizations throughout the United States on agricultural labor and employment issues. Its membership includes farm cooperatives, growers, packers, processors, and agricultural associations in all 50 states. Collectively, they

employ about 75 percent of the nation's total agricultural workforce.

The *amici* and their members have a direct interest in the outcome of this case. Many of the activities involved in modern production agriculture, such as irrigation, fertilizer and pesticide application, and harvesting, require services to be performed on the farm at particular times in the season. Because these services are needed only episodically, most farmers rely upon contractors who can spread their equipment and personnel costs among multiple farm customers. The personnel who provide these services are employed in "agriculture," subject to the agricultural provisions of the National Labor Relations Act (NLRA) and the FLSA at issue in this case. The contrary decision of the National Labor Relations Board (NLRB or Board) is inconsistent with the express language and legislative history of the statutory definition of "agriculture" and erodes the protections given by statute to the employers of agricultural laborers who perform services on the *amici's* members' farms. The *amici* and their members also have an interest in avoiding an unwarranted narrowing of other farm-related provisions in the FLSA which are based on the FLSA's definition of "agriculture."[1]

SUMMARY OF ARGUMENT

The term "agriculture," as used in the FLSA and made applicable to the NLRA, encompasses primary farming and, secondarily, a wider range of practices which are incident to, or performed in conjunction with, primary farming operations. Secondary agriculture includes practices performed "by a farmer" *and* practices performed "on a farm" by a person who is not a farmer or employed by a farmer. 29 U.S.C. § 203(f). The NLRB and the court below, by looking

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

solely at the status of the live-haul unit employer, disregarded the alternative, "on a farm," locus-of-services element of the statutory definition.

Chicken catchers and forklift drivers in live-haul units are agricultural laborers because these employees of the petitioner perform work on a farm in conjunction with the primary farming activity of raising poultry. Live-haul drivers are agricultural laborers because they perform the secondary agriculture function of "delivery to storage," 29 U.S.C. § 203(f), for their employer who resumes farmer status between the grow-out farm and the point when the chickens leave storage for processing.

This statutory interpretation is supported by the legislative history of the FLSA's definition of "agriculture," a source to which this Court has turned at least twice. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 767 (1949); *Maneja* v. *Waialua Agric. Co.*, 349 U.S. 254, 260 (1955). The bill that became the FLSA was amended during passage to include in the definition of "agriculture" work performed "on a farm" and "delivery to storage or to market." The Senate debate over these provisions in 1937 clearly shows that the term "agriculture" should be construed expansively.

While decisions of the NLRB construing the NLRA are treated deferentially on judicial review, the broad deference accorded the Board by the court below is inappropriate. This case, unlike *Bayside Enter., Inc.* v. *N.L.R.B.*, 429 U.S. 298, 302 & n.10 (1977), solely involves a question of statutory interpretation where the NLRB has made legal errors. The statute being interpreted is the FLSA, which has not been entrusted to the NLRB to administer. Even under a deferential standard of review, however, the decision should not stand because it has no reasonable basis in the language or legislative history of the statute. Finally, if the Court decides to defer to the NLRB in this case, it should explicitly limit its holding to the National Labor Relations Act as administered

by the Board, so that lower courts do not defer to the NLRB's rationale when construing the definition of "agriculture" in cases arising only under the FLSA.

ARGUMENT

I. THE NLRB'S INTERPRETATION OF THE AGRICULTURE DEFINITION SHOULD NOT BE ENFORCED BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE STATUTE.

The National Labor Relations Act specifically exempts agricultural laborers from the broad scope of its definition of "employee." 29 U.S.C. § 152(3). Congress, through annual appropriations riders, *e.g.*, 108 Stat. 2569-2570 (1994), has tied the agricultural laborer exception to the definition of "agriculture" in § 3(f) of the FLSA. In deciding whether Holly Farms' chicken catchers, forklift drivers, and live-haul drivers were agricultural laborers, it is FLSA § 3(f) "and the decisions construing it which are relevant even though this proceeding arose under the NLRA." *Bayside*, 429 U.S. at 300 & n.6.

This Court has explained that the FLSA's definition of "agriculture"[2] has two distinct meanings. The primary meaning includes farming in all its branches, including those

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[2] "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

practices (such as poultry raising) listed specifically in the definition. *Farmers Reservoir*, 337 U.S. at 762-763. The secondary meaning is broader:

> Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed *either by a farmer or on a farm*, incidentally to or in conjunction with "such" farming operations.

Id. at 763 (emphasis added). It is the meaning of "on a farm" which is the principal issue in this case, and which the NLRB and the court below erred in interpreting.

A. The "On A Farm" Component Of The Secondary Meaning Of "Agriculture" Does Not Depend Upon The Employer Of The Laborer.

The NLRB, and the majority below, held that employees who work "on a farm" can be considered exempt agricultural laborers only if that work is performed incidental to or in conjunction with their employer's primary agricultural practices. As Judge Niemeyer explained in his partial dissent, work "on a farm" is covered when it is performed incident to or in conjunction with primary farming as defined functionally in the statute (which includes poultry raising), with no limiting reference to the agricultural practices of the employer.[3] *Holly Farms Corp.* v. *N.L.R.B.*, 48 F.3d 1360, 1373 (4th Cir. 1995).

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[3] The principal cases from this Court relied upon by the majority below are inapposite, for they construe the "by a farmer" component of the test in circumstances where the Court concluded that the work was *not* done on a farm. *Farmers Reservoir*, 337 U.S. at 767-769 (work, not done on the farm, was performed for an employer who was not engaged in farming); *Bayside*, 429 U.S. at 301 (where work not done on a farm, "by a farmer" test "depends on the character of the employer's activities.").

The statute limits on-farm work by looking at whether such work is "incident to or in conjunction with" farming activities, instead of looking at the activities of the employer. As Senator Black, the author of the definition of "agriculture," put it during the Senate debate on the FLSA, "For instance, a farmer might build on his farm a factory for the purpose of manufacturing shirts and sending them throughout the United States * * * * [T]hat would not be considered a farming activity." 81 Cong. Rec. 7657-7658 (1937).

This Court construed the "on a farm" test forty years ago in determining the status of laborers working in a sugar milling operation located on a large sugar cane plantation. *Maneja* v. *Waialua Agric. Co.*, 349 U.S. 254 (1955). In determining whether the workers in the mill were agricultural employees, the Court remarked that "the question here presented is a limited one: is the milling operation part of the agricultural venture?" *Id.* at 265. The Court answered the question by determining whether the type of work was ordinarily performed by farmers. *Id.* at 265-266. If the type of work is ordinarily performed by farmers, it is probably incident to the farming operation; if not, the process may be "more akin to manufacturing than to agriculture." *Id.* at 265. Thus, the relevant inquiry is whether the type of work in question is ordinarily performed by a farmer, rather than whether the employer is engaged in farming activities.

B. The Live-Haul Employees In This Case Are Engaged In "Agriculture" Under The Statutory Definition.

Under the proper statutory analysis, each of the three different types of live-haul employees are agricultural laborers. Chicken catchers and forklift drivers perform primary farming activity as well as secondary farming activity on a farm, and live-haul drivers perform secondary farming activity for a farmer.

1. Chicken catchers are engaged in "agriculture" under the statutory definition.

Chicken catchers fall squarely within the agriculture definition because they work "on a farm." The NLRB conceded this point below. See *Holly Farms*, 48 F.3d at 1371. As it is self-evident that catching chickens and putting them in crates on the farm is farming activity, this work satisfies the secondary definition of "agriculture." At a minimum, under the *Maneja* test, this activity is more akin to agriculture than it is to manufacturing.

Primary agriculture includes, *inter alia*, "the raising * * * of poultry," and "harvesting of any agricultural * * * commodities." 29 U.S.C. § 203(f). The work of chicken catchers is an essential part of poultry raising. Chicken catchers also are involved in "harvesting" chickens, which are agricultural commodities. See WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY at 86 ("agriculture" is "[t]he science, art, and business of cultivating the soil, producing crops and raising livestock"); 1 BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, 1992 CENSUS OF AGRICULTURE, app. A, at A-6 (including chickens as part of the "Poultry and eggs" category of agricultural commodities); 29 C.F.R. § 780.112 (1995) (stating that the term "agricultural commodity" includes "domesticated animals and some of their products"). The Secretary of Labor, who is responsible for interpreting the FLSA, defines "harvesting" as "the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession." 29 C.F.R. § 780.118(b) (1995). The activity of catching chickens and putting those chickens into crates evokes a particularly striking image of "reduc[tion] to possession," and those who perform this work are engaged in primary agriculture.

2. Forklift drivers are engaged in "agriculture" under the statutory definition.

Forklift drivers also qualify as agricultural laborers. The forklift drivers on the live-haul crews take the caged chickens provided by the chicken catchers and load the cages onto a flat-bed truck. Forklift drivers on live-haul crews work "on a farm," as the NLRB conceded. The task of congregating agricultural materials before shipping them off to market has been traditionally performed by farmers, and this work is certainly more akin to agriculture than it is to manufacturing.

Forklift drivers, like the chicken catchers discussed in the preceding section, also are involved in the primary agricultural activity of harvesting. As the Secretary of Labor interprets the term, "harvesting" includes "transportation to a concentration point on the farm." 29 C.F.R. § 780.118(b) (1995). The forklift drivers meet this test, because they transport the caged chickens from the point on the farm where the chickens are caged, to the point on the farm where the cages are loaded onto the truck.

3. Live-haul drivers are engaged in "agriculture" under the statutory definition.

The work of live-haul drivers differs from the work of chicken catchers and forklift drivers. A live-haul driver drives a flat-bed truck, which carries the entire live-haul crew to the farms of the contract growers. Once the chickens have been loaded onto the truck, the live-haul driver delivers the chickens to a storage area near Holly Farms' processing plant.

Much of the work of live-haul drivers is not, unlike the work of other members of live-haul crews, performed "on a farm." Nevertheless, the statutory definition of "agriculture" in § 3(f) of the FLSA expressly includes the task of "delivery to storage" within the boundaries of secondary agriculture.

Accordingly, live-haul drivers are engaged in agriculture if their work is done "by a farmer," which depends upon whether Holly Farms, the drivers' employer, is engaged in primary agriculture at relevant intervals with respect to the chickens. See *Bayside*, 429 U.S. at 301.

The agriculture definition is very broad, and Congress intended for it to cover all phases of the agricultural process. Beginning with activities such as cultivating the soil or undertaking preparatory secondary farming activities incident to the raising of poultry, agriculture continues until the agricultural commodity in question has been safely delivered to market, storage, or a common carrier. As this Court indicated in *Maneja*, agriculture ends when the agricultural commodity is used in a manufacturing process. Until such time, however, the process of agriculture continues unabated.

For example, in *Mitchell* v. *Budd*, 350 U.S. 473 (1956), the Court held that a bulking plant changed the nature of tobacco, and thus was "'more akin to manufacturing than agriculture.'" *Id.* at 481-482 (quoting *Maneja*, 349 U.S. at 265). Because the bulking plant engaged in manufacturing, the agricultural process ended "with the delivery of the tobacco at the receiving platform of the bulking plant. That is the 'delivery * * * to market' within the meaning of § 3(f) of the Act." *Mitchell*, 350 U.S. at 481 (quoting 29 U.S.C. § 203(f)). In the case at bar, Holly Farms' poultry processing plant engages in manufacturing, and the agricultural process ends at the storage sheds, from which the chickens are taken for processing.[4]

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[4] The Board may argue that the agricultural process ends on the farm of the contract grower rather than at the storage shed. Alternatively, the Board may attempt to characterize the live-haul drivers' work as incidental to Holly Farms' poultry processing work rather than incidental to Holly Farms' raising of poultry. (continued...)

Once it is understood that the trip from the grow-out farm to the storage shed involves agriculture, the only question remaining is who constitutes the farmer at that stage. The only two choices, of course, are Holly Farms and the contract grower. The Board acknowledges that Holly Farms' hatchery operation is primary agriculture. Under the Board's theory (as adopted by the court below), however, once Holly Farms turns the chicks over to the contract growers, Holly Farms irrevocably loses its status as a farmer with respect to those chicks. See *Imco Poultry*, 202 N.L.R.B. 259, 260 (1973) ("when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks.").

What *Imco Poultry* shows, however, is that no chicken can serve two farmers. Once the contract growers undertake the responsibilities of raising the chickens, Holly Farms' status as a farmer engaged in the primary agricultural activity of raising chickens is suspended. Because the vertically integrated chicken producer retains title to the chickens while they are on the contract farms, *Imco Poultry* can only be based on a possession theory. Whoever has physical possession of the birds acts as a farmer so long as the process of agriculture is continuing. Once Holly Farms regains physical possession of the chickens, it should also resume its farmer

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[4] (...continued)
Such arguments should be rejected as being flatly inconsistent with the language and intent of the agriculture definition. The statutory language expressly includes "delivery to storage" as agricultural activity; any attempt by the Board to end the process sooner is in flagrant derogation of the wording of the definition. Similarly, the Board cannot point to any indication that Congress intended for manufacturing to be construed broadly, or that Congress recognized the concept of "secondary manufacturing" that would incorporate practices incident to manufacturing.

status with respect to the birds, through "delivery to storage," 29 U.S.C. § 203(f), to the point in the process where manufacturing begins.

Thus, Holly Farms is engaged in the primary agricultural activity of raising poultry when the live-haul drivers do their work. Because live-haul drivers are employed by a firm engaged in primary agricultural activity, their secondary agricultural activity qualifies as work performed "by a farmer" under the definition. The inescapable nature of this conclusion has been addressed by the Fifth Circuit:

> Transportation of grownout broiler chickens from the contract farms where they are raised to the processing plants where they are sold is clearly work performed "by a farmer * * * as an incident to or in conjunction with" [a vertically integrated poultry firm's] primary farming task of raising poultry. Any doubt that this is the case is removed by the express statutory language including "preparation for market" and "delivery to storage or to market" as practices incidental to any agricultural enterprise.

Coleman v. *Sanderson Farms*, 629 F.2d 1077, 1081 (5th Cir. Unit A 1980) (quoting 29 U.S.C. § 203(f)). See also *N.L.R.B.* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972) (live-haul drivers are agricultural laborers). Therefore, when live-haul drivers perform the statutorily-defined secondary agricultural activity of "delivery to storage," they are agricultural laborers excluded from the scope of the NLRA.

II. THE NLRB'S INTERPRETATION OF THE FLSA'S DEFINITION OF "AGRICULTURE" IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE STATUTE.

A. Congress Intended a Broad Definition of "Agriculture" Covering Work of Third-Party Employees On A Farm.

Senator Black, the author of the agricultural exception in the FLSA, explained on the floor of the Senate that his bill had been drawn carefully to exclude agricultural laborers of all kinds from the scope of the Act:

> It specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.
>
> We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture.

81 Cong. Rec. 7648 (1937) (statement of Senator Black).

Notwithstanding Senator Black's assurances, other senators became concerned that the proposed definition was not sufficiently comprehensive. When the bill was first introduced, secondary agriculture was defined as "any practices ordinarily performed by a farmer as an incident to such farming operations." 81 Cong. Rec. 7653 (1937). The senators knew that farmers frequently found it necessary to engage others to perform on-farm agricultural work. These senators were concerned that the work of persons employed by such businesses would not fall within the scope of the definition as originally drafted:

Mr. TYDINGS: The threshing of wheat and similar crops on the farm would be classed as coming within the agricultural exemption; would it not?

Mr. BLACK: I so understand.

Mr. TYDINGS: What I am thinking of is that quite often the threshing crew is not a part of the farmer's organization. There are men who make a business of going around with threshing and baling machines with enough help to come upon a farm and make a contract with the farmer to thresh his wheat. I should like to know if in such a case it is the Senator's opinion that the threshing crew would be exempt, or whether they would be under the operation of the hours provision of the bill. * * *

> I am asking this question because I believe, inadvertently, a loophole has been left which I am sure the proponents of the bill do not mean to leave. * * * [A]s I understand, farming in all its operations, from the time the grain is put into the ground until it leaves the farm, is to be exempted from the provisions of the measure; but under the bill such a man as I have indicated is not exempt.

81 Cong. Rec. 7653 (1937).

At least one senator, however, believed that such employees should not be considered agricultural laborers:

> I think the business experience of us all will justify the conclusion that if a man operates a threshing outfit, and goes from one farm to another farm, such a man is an independent contractor. He is not a farmer. That is not an operation incident to farming, because the man

> is engaging in a cold-blooded business operation, going from one farm to another, precisely as a huckster goes around and sells tinware to farmers.

81 Cong. Rec. 7659 (1937) (statement of Senator Bone).

In order to clarify that workers performing agricultural work on farms were to be included in the definition, the Senate adopted Senator McGill's amendment, which added the words "or on a farm" and "including delivery to market" to the secondary meaning of "agriculture." 81 Cong. Rec. 7888 (1937). Although the independent-contractor wheat thresher was the paradigm example of an agricultural laborer to be included under the amendment, Senator McGill clearly indicated that the amendment applied to any farm commodity:

> Mr. GEORGE: Is it the purpose of the amendment to exempt those who thresh grain?
>
> Mr. McGILL: Those who thresh grain, who harvest grain and deliver it to market.
>
> Mr. GEORGE: Would the amendment also apply to the harvesting of any other crop?
>
> Mr. McGILL: It would apply to any commodity produced on a farm.

Ibid. Senator McGill also explained that the amendment was intended to apply broadly to on-farm work:

> Mr. McGILL: I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes * * * * and the language would also include all labor performed in making delivery to market.

Ibid. The Senate approved Senator McGill's amendment, *ibid.*, and the language was incorporated into the final version

of § 3(f) of the FLSA. See 29 U.S.C. § 203(f). The House of Representatives subsequently expanded the agriculture definition even further by adding the "delivery to storage" language. See H.R. Rep. No. 2182, 75th Cong., 3d Sess. (1938).

B. The NLRB's Decision is Contrary to the Legislative History, Renders the Agriculture Exception Meaningless, and Burdens American Farmers.

The legislative history of the FLSA shows clearly that Congress intended the term "agriculture" to include on-farm farming work and delivery to storage, performed by third-party employees. This Court has used the legislative history as an aid to interpreting the agriculture provision in *Farmers Reservoir*, 337 U.S. at 767, and in *Maneja*, 349 U.S. at 260. The Fifth Circuit provided a thorough analysis of the legislative history in an FLSA case construing § 3(f). *Reich* v. *Tiller Helicopter Serv.*, 8 F.3d 1018, 1023-1027 (5th Cir. 1993). Significantly, none of the cases adopting the NLRB's present construction of the statute even mention the legislative history. See, *e.g.*, *Holly Farms Corp.* v. *N.L.R.B.*, 48 F.3d 1360 (4th Cir. 1995); *N.L.R.B.* v. *Hudson Farms, Inc.*, 681 F.2d 1105 (8th Cir.) (per curiam), cert. denied, 459 U.S. 1069 (1982); *Valmac Indus.* v. *N.L.R.B.*, 599 F.2d 246 (8th Cir. 1979). Thus, none of these courts has faced the impossible task of reconciling the NLRB's construction with the agriculture definition's legislative history.

The erroneous reasoning in the NLRB's interpretation and the decision of the court below can be seen clearly in the following example. Assume that a farmer wishes to engage a non-farmer third party and his or her employees to perform secondary agricultural tasks on a farm. The laborers thus hired are precisely those to whom Senator McGill's amendment was designed to apply. Under the decisions of this Court, the laborers would be employed in "agriculture." Under the NLRB's interpretation, however, the laborers would be dragged within the scope of the NLRA as "employees" because the laborers' employer (the third party with whom the farmer contracts) does not perform primary farming. The NLRB's interpretation renders the agricultural labor exception meaningless. The fact that the NLRB's interpretation reaches an incorrect result in a case explicitly anticipated by a legislative amendment shows that the Board's decision does not have a reasonable basis in law.

By turning its back on clear congressional intent, the NLRB destroys the value of the agricultural exemption to farmers. In today's economic environment in production agriculture, farmers are increasingly finding it necessary to seek out the specialized efficiency of third parties to perform secondary agricultural tasks. If, contrary to Congress' desires, the NLRB succeeds in placing such third parties outside of the agricultural exemption, the contractors will be subject to vastly increased costs in the form of unionization costs and overtime costs under the FLSA. Such costs will almost certainly be passed through to the farmer employing the independent contractor, and will add significantly to the cost of production agriculture.

Modern production agriculture has also been characterized by increased vertical integration. Vertical integration allows farmers to reduce costs that would otherwise become prohibitive. See Allen M. Featherstone & Bruce J. Sherrick, *Financing Vertically Coordinated Agricultural Firms*, 74 AM. J. AGRIC. ECON. 1232, 1235 (1992) (referring to cost efficiencies resulting from the reduced transaction and agency costs, improved scale, and improved technology adoption). Vertical integration has also become necessary to obtain maximum productivity from agricultural assets. See *id.* at 1237 (observing that vertical integration in the hog sector could release between 20% and 40% of assets from a farmer's balance sheet and allow for more productive use of those assets). The evolving challenges of modern production agriculture will continue to require farmers to internalize some agricultural production functions and to contract others

away. By reading the words "on a farm" out of the agriculture definition, the NLRB is imposing huge costs on the farming community.

III. THIS COURT SHOULD NOT DEFER TO THE INTERPRETATION OF THE NLRB.

This case comes to the Court after deferentially limited review by the court below. Several factors in this case point away from judicial deference to the NLRB's decision. Even if the most deferential standard were to be applied, however, the NLRB's decision cannot survive scrutiny.

A. Under The Circumstances Of This Case, The NLRB Does Not Deserve Extensive Deference From This Court.

Although this Court deferred to the NLRB in analogous circumstances in *Bayside*, 429 U.S. at 303-304, several circumstances in this case indicate that deference is not appropriate. First, the NLRB in this case is interpreting statutory language, not making fundamental policy choices or finding facts. Second, the language that the NLRB is interpreting has not been committed to that agency's discretion. Finally, Congress has announced in a separate statutory command that the NLRB is not to expand its jurisdiction at the expense of farming in America.

The NLRB is entitled to broad deference when making factual determinations, *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 691 (1951) (citing *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951)), or developing fundamental national labor policy. *Beth Israel Hosp.* v. *N.L.R.B.*, 437 U.S. 483, 500 (1978). In the case at bar, however, the facts are agreed upon, and the NLRB has construed unambiguous statutory language. This Court has made clear that:

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

N.L.R.B. v. *Brown*, 380 U.S. 278, 291-292 (1965). It is the judiciary, not the NLRB, that is the final authority on statutory construction, and this Court must reject administrative constructions that are contrary to clear congressional intent. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Courts should defer to an agency's interpretation of a gap in a statute that Congress entrusted the agency to administer. *Id.* at 842-843. In the present case, however, the NLRB interpreted a provision of the FLSA, a statute entrusted by Congress to the Secretary of Labor. According to the Secretary of Labor's interpretation of the FLSA (discussed *supra* in section I.B), it appears likely that the Secretary would at least find chicken catchers and forklift drivers to be employed in "agriculture" under the FLSA. Indeed, substantive interpretation by the NLRB of § 3(f) of the FLSA may intrude inappropriately into construction of this section in FLSA cases. See, *e.g.*, *Marshall* v. *Abbott Farms, Inc.*, 559 F.2d 1006, 1007 & n.1 (5th Cir. 1977).

The appropriations rider that directs the use of § 3(f) of the FLSA also suggests that deference should not be granted here. The appropriations rider contains the following cautionary language:

> *Provided*, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of

> agricultural laborers as referred to in section 2(3) of the [NLRA], and as defined in section 3(f) of the [FLSA] * * * *

108 Stat. 2570 (1994). The fact that Congress felt so strongly about protecting the boundaries of the agriculture definition that it made the NLRB's operating funds contingent upon the NLRB abiding by the statutory language is strong evidence that Congress did not want courts deferring to the Board's decisions in this area.[5] The appropriation, set forth in a statute not committed to the NLRB's discretion, expresses deep congressional concern that the NLRB will illegitimately attempt to expand its jurisdiction at the expense of the agriculture definition. In order for this Court to effectuate this clearly expressed congressional intent, it must scrutinize the NLRB's decisions construing the agriculture definition.

B. If The Court Were To Show Deference To The NLRB's Decision, The Bargaining Order Should Not Be Enforced Even Under The Relaxed Standard Of Review.

Earlier this Term, this Court indentified the factors it will consider when applying deferential review to a decision of the NLRB. See *N.L.R.B.* v. *Town & Country Elec., Inc.*, No. 94-947, slip op. (November 28, 1995). In that case, the Court evaluated the NLRB's decision against the statutory language, the statutory purpose, the legislative history, and the relevant precedent. See *id.* at 5-6. As has been demonstrated *supra*, the Board's decision in this case contravenes the statutory language and violates manifest congressional intent. It runs foul of precedent such as *Maneja*, and runs

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[5] The appropriations rider may not be dismissed as a lonely indication of subsequent congressional intent. Congress has consistently maintained this policy for almost 50 years by inserting identical language in the NLRB's appropriation every year since 1946. *Bayside*, 429 U.S. at 300 n.6.

counter to the congressional policy of limiting the Board's jurisdiction to non-agricultural employees. See 29 U.S.C. § 152(3). Thus, the Board's decision does not have a reasonable basis in law, and this Court should refuse to enforce the Board's order.

C. Assuming *Arguendo* That This Court Were To Defer To The Agency's Decision In This Case, The Court Should Expressly Limit Its Holding To The NLRA Context In Order To Prevent The Board's Rationale From Infecting Analysis Under The FLSA.

If, notwithstanding the above compelling reasons not to defer, this Court were to decide in this case that it should defer to the Board, the Court should expressly limit its holding to the NLRA context. As stated above, the agricultural definition is located in the FLSA and materially affects many provisions in that statute of great interest to the farming community. See, *e.g.*, 29 U.S.C. § 213(a)(6) (family farm exemption); 29 U.S.C. § 213(b)(12) (agricultural exemption); 29 U.S.C. § 213(c) (agricultural child labor exemption). The FLSA has been entrusted by Congress to the Secretary of Labor. Given an opinion by this Court deferring to the NLRB's interpretation of the FLSA, many lower courts would likely apply the Board's rationale when applying the FLSA. See *Marshall* v. *Abbott Farms, Inc.*, 559 F.2d 1006, 1007 & n.1 (5th Cir. 1977) (applying NLRA precedent to an FLSA case).

There is no conceivable argument that the Board's views on the agriculture definition should constitute precedent under a separate statute committed to the discretion of a different agency. Accordingly, if the Court should decide to defer to the NLRB in this case, it should expressly limit its holding to the NLRA context in order to prevent the NLRB's rationale from infecting lower courts' analysis under the FLSA.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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No. 95-210

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor,

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL BROILER COUNCIL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the chicken catchers, forklift operators, and live-haul drivers who catch, cage, and load live chickens on a farm for transportation to a producer's storage facility are engaged in work "by a farmer or on a farm as an incident to or in conjunction with * * * farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market," 29 U.S.C. § 203(f), and are therefore agricultural laborers exempt from the National Labor Relations Act.

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AND ALL AFFILIATED WITH THE
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**On Writ of Certiorari to the
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for the Fourth Circuit**

BRIEF OF AMICUS CURIAE THE NATIONAL BROILER COUNCIL IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Organized in 1954, the National Broiler Council ("NBC") is a national trade association representing the producers and processors of more than 95 percent of the broiler/fryer chickens consumed in the United States.[1]

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[1] This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

NBC and its 225 member companies have a vital interest in the question presented in this case: whether employees of vertically integrated poultry producers who perform the tasks on a farm of catching, caging, loading, and transporting live chickens are properly classified as agricultural laborers exempt from certain requirements of the National Labor Relations Act ("NLRA") or instead as employees fully subject to the NLRA.

The operations of vertically integrated poultry producers embrace most aspects of poultry production, from hatching to processing to marketing. The court below accepted the position of the respondent, the National Labor Relations Board (the "NLRB" or "Board"), that the chicken catchers, forklift operators, and live-haul drivers employed by petitioners to perform agricultural activities on a farm are nevertheless not "agricultural laborers" under the NLRA, because they work for vertically integrated producers whose operations also include some non-agricultural activities. Pet. App. at A-48. This decision is contrary to the plain language of the relevant statute and, if upheld, would cause employees of integrated producers who perform agricultural activities on farms to be treated differently from employees of other producers who perform the identical activities. The NBC and its members have a strong interest in ensuring that federal labor laws apply uniformly to all agricultural producers throughout the Nation, and the NBC therefore urges the Court to reverse the judgment of the Court of Appeals.

STATEMENT OF THE CASE

As is typical of the operations of integrated poultry producers throughout the Nation, petitioners' chicks are entrusted to the care of independent contract farmers to be raised in conjunction with the activities of petitioners' employees. *See* NLRB Opp. App. at 3a; Pet. App. at A-787 to A-788 n.268. Some of these chicks—called broilers—are destined for retail stores, while others—called pullets or breeder chickens—are used for breeding

purposes. NLRB Opp. App. at 3a. Petitioners retain ownership of the chickens at all times and provide the feed and medicine necessary for their growth.

The contract farmers, however, do not perform all of the agricultural activities necessary to raise petitioners' chickens. For example, with respect to the broiler chickens, petitioners' employees perform the final "harvesting" of those chickens on the farms where they have been raised. This harvesting is done by petitioners' "live-haul" employees, who work in teams on the farms where the chickens are being raised.[2] The teams go to the farms at night, transported on flat bed trucks driven by the live-haul drivers. Once at the farm, the chicken catchers catch and cage the chickens. The forklift operator then places the cages on the flat bed truck, which is driven by the live-haul driver to a storage area near petitioners' processing plant. Pet. App. at A-58. *See also National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 820-822 (1978) (describing typical operations of vertically integrated poultry producers); *Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077, 1078 (5th Cir. Unit A 1980) (such "operations are apparently typical of those prevailing in the poultry industry"). Although the activities at issue in this case are performed by petitioners' employees, NBC's member companies often engage independent contractors organized specifically to provide such live-haul services. *See infra* at 17-18 & n.8.

Petitioners also employ similar workers in their hatchery operations. Some of these workers, variously referred to in the record as "pullet catchers," "pullet movers," or

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[2] In this brief, the term "live-haul employees" refers to persons employed by integrated poultry producers as chicken catchers, forklift operators, and live-haul drivers. A live-haul team consists of one live-haul driver, one forklift operator, and about nine chicken catchers. Pet. App. at A-40 to A-41.

"pullet haulers," catch pullets on contract farms, vaccinate them, cage them and then transport them to "laying houses" on those farms, where they lay eggs. Other of petitioners' employees, referred to as "egg haulers," transport the eggs to a hatchery where the process begins anew. NLRB Opp. App. at 3a. The main distinction between the pullet catching crews and the broiler catching crews is that the broiler crews work out of the processing operations while the pullet crews work out of the hatchery operations. *Id.* Their tasks, however, are essentially the same.

The NLRA excludes from its definition of an "employee" subject to the jurisdiction of the Board any individual employed as an "agricultural laborer." 29 U.S.C. § 152(3). "Agricultural laborer" is defined by reference to Section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(f), which defines "agriculture" to include "farming in all its branches," including "the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

In a representation proceeding brought to determine the appropriate bargaining unit for various of petitioners' employees, including both the pullet and the broiler crews, the Board—acting through the Regional Director—held that the pullet handlers and egg haulers were agricultural laborers exempt from coverage under the NLRA. NLRB Opp. App. at 4a. The Board reasoned that because petitioners' hatchery operations are agricultural activities within the ambit of the exemption, the pullet handlers and egg haulers, who perform work in conjunction with those hatchery operations, are "similarly engaged in the exempt activity of raising poultry." *Id.*

The Board, however, reached the opposite conclusion with respect to the broiler live-haul crews, reasoning that

"when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks." *Id.* at 4a-5a. This holding was reaffirmed by an Administrative Law Judge in a subsequent proceeding by the union alleging unfair labor practices. *See* Pet. App. at A-786 to A-788. The Administrative Law Judge's ruling was then affirmed by a majority of the full Board. *See id.* at A-83 n.8, A-167 to A-168. Board Member Oviatt dissented because he found that petitioners' live-haul employees are agricultural laborers and therefore not covered by the NLRA. *Id.* at A-187 to A-188.

The Court of Appeals for the Fourth Circuit enforced the NLRB's order, over the partial dissent of Judge Niemeyer. The majority accepted the Board's position that the live-haul employees, even though most of them concededly perform agricultural activities on a farm, are nevertheless not agricultural laborers under the NLRA because "by the time they perform their work on the broiler chickens, their employer * * * is no longer engaged in primary agriculture with respect to those chickens." *Id.* at A-48. The Court thus ignored the plainly agricultural nature of the employees' work, as well as the conceded fact that the work was performed on farms, and instead relied solely on the fact that the chickens being caught on those farms had previously been entrusted to independent contractors to be raised. *Id.*

Like Board Member Oviatt, Judge Niemeyer concluded that petitioners' live-haul employees were not properly included in the bargaining unit because they are agricultural laborers excluded from the NLRA's coverage. *Id.* at A-60. Relying on the plain language of the governing statute, he concluded that

> the work of chicken catchers and fork lift operators was performed "on a farm as incident to or in conjunction with such farming operations" and therefore clearly qualifies these individuals as "agricultural la-

> borers." Moreover, all these chicken catchers, fork lift operators, and live-haul drivers were involved in "preparation for market" and "delivery to storage or to market." [*Id.*]

As explained below, there is no other reasonable interpretation of the plain language of the statute, and the Court should therefore reverse the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

The plain language of the governing statute is unambiguous. The term "employee" under the NLRA (incorporating the relevant definition under the FLSA) does not include any individual engaged in "the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. § 203(f). Under that definition, petitioners' employees are plainly agricultural laborers for two independent reasons: (1) because they perform activities "on a farm" that are incidental to the raising of poultry, including activities in "preparation for market, delivery to storage or to market or to carriers for transportation to market," and (2) because they perform such activities for a farmer. The Board's erroneous interpretation, embraced by the Court of Appeals, is contrary to Congress' intent as reflected in the plain language of the statute. Rather than examining the character of the employee's work as Congress intended, the Board's interpretation incorrectly focuses on petitioners' status as vertically integrated poultry producers.

Although the plain language of the statute is dispositive, the legislative history of the FLSA and the policy underlying the agricultural exemption likewise confirm that petitioners' employees are agricultural laborers. Before final passage of the statute, Congress amended the relevant language specifically to ensure that individuals

performing activities on a farm and incidental to farming, such as the employees of independent wheat harvesting companies, would be exempt regardless of whether they work for the owner of the particular farm or for someone else. Thus, Congress plainly intended to exempt all individuals who harvest agricultural commodities (including those who "harvest" chickens), even where the individual does not work for the particular farmer. The Board's contrary interpretation incorrectly accords a different status under federal law to the employees of vertically integrated producers than to other employees who perform precisely the same activities.

Finally, the Court of Appeals erred in deferring to the Board's interpretation of the FLSA, for two reasons. First, no deference is appropriate because Congress' intent, as expressed in the unambiguous language of the statute, is clear. Second, it is in any event improper to defer to the Board's interpretation of the FLSA, because administration of that statute has been entrusted not to the Board but to the Secretary of Labor. Contrary to the Board's position in this case, the Secretary of Labor has issued a definitive interpretation of the FLSA establishing that petitioners' employees are agricultural laborers under the relevant statutory language. Thus, if any deference is appropriate in this case, the Court should defer to the Secretary of Labor's contrary interpretation of the FLSA, not the Board's.

ARGUMENT

I. PETITIONERS' LIVE-HAUL EMPLOYEES ARE AGRICULTURAL LABORERS UNDER THE PLAIN LANGUAGE OF THE STATUTE.

The NLRA specifically excludes from its definition of an "employee" subject to the jurisdiction of the Board any individual employed as an "agricultural laborer." 29 U.S.C. § 152(3). As this Court has noted, since 1947 Congress has annually enacted a rider to the Board's ap-

propriations bill mandating that the definition of "agricultural laborer" under the NLRA shall be the definition provided by Section 3(f) of the FLSA. *See Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977); Departments of Labor, Health and Human Services and Education and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, Title IV, 108 Stat. 2539, 2570 (most recent appropriations act).

Under Section 3(f) of the FLSA, the term "agriculture" is defined to include:

> farming in all its branches and among other things includes * * * *the raising of* * * * *poultry*, and any practices * * * performed by a farmer *or* on a farm as an incident to or in conjunction with such farming operations, *including preparation for market, delivery to storage or to market or to carriers for transportation to market.* [29 U.S.C. § 203(f) (emphasis supplied).]

As the Court has explained, this definition comprises two "distinct branches." *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762 (1949). The first (or primary) meaning includes farming in all its branches. *Id.* Vertically integrated poultry producers often perform farming in the primary sense (for example, as the Board has conceded in this case, when they operate hatcheries). But the definition of agriculture (and thus an agricultural laborer) is not limited to farming itself. The definition also encompasses the "broader" (or secondary) meaning of agriculture:

> Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed *either* by a farmer *or* on a farm, incidently to or in conjunction with "such" farming operations. [*Id.* at 763 (emphasis supplied).]

See also id. at 766 ("Such practices are exempt only if they are performed by a farmer *or* on a farm.") (emphasis supplied).

Under this statutory definition, it is clear that petitioners' live-haul employees are "agricultural laborers" within the plain meaning of the statute. The chicken catchers and forklift operators work "on a farm" (as even the Board has conceded), doing tasks in conjunction with farming operations. *See* Pet. App. at A-46. The live-haul drivers not only assist the chicken catchers in those tasks on the farms, but are also clearly included in the definition of Section 3(f) as persons performing the "delivery [of poultry] to storage or to market or to carriers for transportation to market." Thus, to the extent that the live-haul drivers do not work on farms, they are plainly performing activities incidental to petitioners' primary activity of "harvesting" poultry.[3] The Board therefore has no jurisdiction over these employees.

This holding is fully in accord with this Court's decision in *Bayside*. The employees at issue there merely transported feed from their employer's facilities to independent farms. There was no claim that they performed their work "on a farm," or that they performed the core agricultural activity of harvesting their employer's chickens. As the Court explained, "[s]ince there is no claim that these drivers work 'on a farm,' the question is whether their activity should be regarded as work performed 'by a farmer.'" 429 U.S. at 301. Because the employer in *Bayside* was not considered a "farmer" with respect to the specific activities at issue in that case, the Court held that the feed deliverers were not agricultural laborers.

This Court in *Bayside* looked to the character of the employer's operations only because it was considering whether the work in question was being performed "by a farmer." The statute, however, applies to practices per-

[3] NBC endorses petitioners' contention that all of the live-haul employees are exempt because petitioners have resumed their statutory status as "farmers" when their employees harvest the chickens. This brief, however, focuses on the separate contention that these employees are exempt because of the work they perform "on a farm," regardless of the status of their employer.

formed *either* "by a farmer" *or* "on a farm." Under this plain language, if the work is performed "on a farm" and otherwise meets the criteria set forth in the statute, it makes no difference whether the worker's employer is a farmer under the statute. The worker is still an agricultural laborer because of the nature of the work he performs "on a farm."

The same distinction was drawn in *Farmers Reservoir*, where the Court considered a contention that the employees of a cooperative association that maintained an irrigation system and delivered water to farmers were employed in agriculture within the meaning of the FLSA. The Court emphasized that the activities of the employees ceased at the point where the water was released from the headgates for delivery to farms, after which point the farmers themselves were responsible for the task of irrigating their own crops on their own farms. 337 U.S. at 763. Thus, the employees of the irrigation cooperative were held not to be exempt from the FLSA because "it is clear that the work of the company's employees is done *neither on a farm or by farmers*." *Id.* at 767 (emphasis supplied). If, by contrast, the employees had been responsible for irrigating the farmers' crops on the farms, they would plainly have been agricultural laborers.

As characterized by the Court of Appeals, the Board contends that petitioners' employees are not agricultural laborers because "by the time they perform their work on the broiler chickens, their employer—Holly Farms—is no longer engaged in primary agriculture with respect to those chickens." Pet. App. at A-48 (citing *Bayside*, 429 U.S. at 302 n.9 and *Imco Poultry*, 202 N.L.R.B. 259, 260 (1973)). "Thus, the Board has reasoned, the employees' activities are neither incidental to nor in conjunction with *Holly Farms'* primary agricultural practices and, therefore, the employees' work cannot amount to secondary agriculture." *Id.* at A-48 to A-49 (emphasis in original). The Board has elaborated on that position before this Court, contending that although the work of the live-

haul employees (at least the chicken catchers and fork-lift operators) concededly takes place "on a farm," the work is not "incident to or in conjunction with" the farming operations of the independent growers (which, according to the Board, consist only of raising chicks), but instead is incidental only to petitioners' "poultry slaughtering operation," which is not itself a "primary" farming operation. NLRB Opp. at 23.

This analysis—which was adopted by the Court of Appeals—is contrary to the plain language of the statute, in that it focuses only on whether the employer is a "farmer" and ignores that the agricultural exemption may also be triggered by the nature of the work performed by employees "on a farm," *regardless* of the status of their employer. To the Board, the character of the work performed by the employees makes no difference, nor does the fact that they perform that work on a farm, because petitioners are integrated poultry producers. The statute, however, specifically includes "the raising of poultry" as a farming operation and exempts *any* employee who performs activities on a farm "incident to or in conjunction with" that farming operation, regardless of who employs that individual. Indeed, as explained below, Congress added the words "or on a farm" to the statute specifically to exempt individuals who perform agricultural activities on a farm but who are not themselves employed by the particular farmer. *See infra* at 14-18.

Likewise, the plain language of the statute disposes of the Board's strained position that catching chickens on a farm, preparing them for delivery to a processing plant, and delivering them to that plant are not activities "incident to or in conjunction with" the primary agricultural activity of raising poultry, but rather are incidental only to subsequent slaughtering activities. The Court need not engage in the Board's fruitless invitation to decide whether the chicken comes before the egg, for Congress has already addressed the precise question in the statute itself. As Congress provided, activities "incident to or in con-

junction with" primary farming specifically "includ[e] preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. § 203(f). There can be no question that the activities of petitioners' live-haul employees fall into one or all of these specifically enumerated categories. For example, in *Mitchell* v. *Budd*, 350 U.S. 473 (1956), in the course of holding that a mechanized tobacco "bulking" operation was not an activity in "preparation for market," the Court concluded that "the agricultural operation" extended up to "the delivery of the tobacco at the receiving platform of the bulking plant." *Id.* at 481. So too here the agricultural activity plainly continues at least until the broilers reach the processing plant.[4]

And even if Congress had not spoken to the issue, the activity of catching chickens on a farm and delivering them for processing is unquestionably "incident to or in conjunction with" the raising of poultry, just as harvesting wheat (an activity specifically mentioned in the legislative history, *see infra* at 14-16) is incidental to the raising of that commodity. In the Board's view, harvesting wheat is incidental only to the subsequent processing of the wheat, an interpretation that cannot be reconciled either with the plain language of the statute or its legislative history. Thus, contrary to the Board's position, the live-haul activities at issue here are plainly "incident to or in con-

[4] In *Mitchell*, the Court also noted that the "bulking" plant was not an agricultural activity under Section 3(f) because "tobacco farmers do not ordinarily perform the bulking operation" and because that operation changes the "natural state" of the tobacco and "turns it into an industrial product" through a process " 'more akin to manufacturing than to agriculture.' " *Id.* at 481-482 (quoting *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 265 (1955)). Neither of these factors is even remotely present in this case. There is no evidence here that chicken catching is not an activity ordinarily undertaken by farmers; indeed, there is no other way to physically cull the chickens for slaughter. And of course the manual labor performed by the live-haul employees is in no way an "industrial" process that alters the "natural state" of the chickens.

junction with" the raising of poultry whether the activities are performed by a farmer or by someone else. Under the statute, the question whether a particular activity is incident to a "primary" farming activity must depend on the nature of the activity itself, rather than the nature of the employer.

In *Bayside*, the Court confirmed that the status of particular employees as agricultural laborers "is determined by *the character of the work which they perform* for their own employer." 429 U.S. at 303 (emphasis supplied). *See also McLeod* v. *Threlkeld*, 319 U.S. 491, 494 (1943) (when construing jurisdiction of the FLSA, "it is the activities of the employee and not of the employer which are decisive"); *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 524 (1942) ("the provisions of the [FLSA] expressly make its application dependent upon the character of the employees' activities"). Thus, it is the character of the work performed by petitioners' employees—agricultural activities that are undertaken "on a farm" and that involve the preparation and delivery of agricultural commodities for market—that render those employees agricultural laborers under the statute, regardless of whether their employer is considered to be engaged in farming under the statute.[5]

II. THE LEGISLATIVE HISTORY AND POLICY OF THE STATUTE CONFIRM THAT PETITIONERS' EMPLOYEES ARE AGRICULTURAL LABORERS.

Because the plain language of the statute is conclusive, there is no need to look any further. *See, e.g., Negonsott* v. *Samuels*, 113 S. Ct. 1119, 1122-23 (1993); *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). But, as explained below, both the legislative

[5] The irrationality of the Board's position is underscored by its holding that the agricultural exemption applies to petitioners' employees who catch broiler chickens, but not to those who catch pullets, notwithstanding that these employees perform the same activities. *See supra* at 3-5.

history of the FLSA, as well as the policies underlying the agricultural exemption, confirm that petitioners' employees are agricultural laborers. Indeed, the legislative history demonstrates that the relevant language of the FLSA was enacted *specifically* to ensure that an individual who performs agricultural activities on a farm is considered an agricultural employee regardless of whether he may work for the owner of the particular farm.

The agricultural exemption to the FLSA was one of the most carefully considered aspects of the entire Act. As this Court has noted, "[f]rom the very beginning of the legislative consideration of the Act, a comprehensive exemption of agricultural labor was a primary consideration of the Congress. Nevertheless, before its final language developed, the agriculture exemption ran the gamut of extensive debates and amendments, each of the latter invariably broadening its scope." *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 260 (1955).

As reported out of Senate committee, the bill that was to become the FLSA originally had exempted farming operations and " 'any practices ordinarily performed by a farmer as an incident to such farming operations.' " *Id.* (quoting S. 2475, 75th Cong., 1st Sess. 51) (emphasis removed). On the Senate floor, however, an amendment was added that specifically inserted the words "or on a farm" into the text of Section 3(f). *See* 81 Cong. Rec. 7888. In the same amendment, the words "including delivery to market" were inserted after the words "farming operations." *Id.*[6] As the Court explained in *Farmers Reservoir*:

[6] Prior to passage by both houses of Congress, the words "delivery to market" were expanded to include "preparation for market, delivery to storage or to market or to carriers for transportation to market." This change was apparently made by a committee of the House following passage by the Senate. *See* H.R. Rep. No. 2182, 75th Cong., 3rd Sess. 2 (1938); *Farmers Reservoir*, 337 U.S. at 765-766 n.14.

> This language was carefully considered by Congress. As originally introduced, the exemption covered such practices only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions *necessary to the farmer* if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. To take care of that situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm. [337 U.S. at 767 (footnotes omitted; emphasis supplied).]

The catching, cooping and delivery of chickens is "necessary to the farmer." Unless someone catches the chickens, the farmer is running a zoo, not a farm.

As the sponsor of this amendment, Senator McGill, made clear:

> [T]he purpose of the amendment is to broaden the definition of "employee" as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing machine outfit and employs a crew and is employed by a farmer to thrash his wheat might be included under the provisions of the bill. Likewise, those who engage in harvesting and delivering to market might be included. [81 Cong. Rec. 7888 (statement of Sen. McGill).]

See also Farmers Reservoir, 337 U.S. at 767 n.16 (quoting colloquy at 81 Cong. Rec. 7653 regarding example of wheat threshers).

The amendment, however, was intended to apply broadly to all such situations, not just the employees of independent wheat threshing companies. When a Senator noted that the picking and harvesting of many other commodities (such as peanuts) is "done purely by contract

with outsiders, who in a great many cases have no farm interest," Senator McGill confirmed that the amendment was intended to apply to "any commodity produced on a farm" and that the intent was "to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes," including "all labor performed in making the delivery to market." 81 Cong. Rec. 7888 (statements of Sens. George and McGill).[7] The next day, he reiterated that "the purpose of those amendments [was] to exclude from the bill all labor performed on a farm, *whether by contract with the farmer or otherwise*, and to exclude all labor connected with the delivery to market of commodities produced on a farm." 81 Cong. Rec. 7927-28 (statement of Sen. McGill) (emphasis supplied).

Senator McGill's amendment was thus intended to address precisely the facts presented in this case. The words

[7] MR. GEORGE. Would the amendment also apply to the harvesting of any other crop [in addition to wheat]?

MR. McGILL. It would apply to any commodity produced on a farm.

MR. GEORGE. Would it apply to peanut pickers who pick in the fields?

MR. McGILL. Yes.

MR. GEORGE. And who move the peanuts to market?

MR. McGILL. Yes; that is my understanding.

* * *

MR. McGILL. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.

MR. GEORGE. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?

MR. McGILL. That is true and the language would also include all labor performed in making the delivery to market.

Id. Senator Black, the sponsor of the bill (and a future member of the Court), also confirmed this interpretation of the amendment. *Id.*

"or on a farm" were specifically intended to confirm that all individuals who perform agricultural activities on a farm but who are not employed by that farmer are nonetheless exempt agricultural workers. Here, petitioners' employees are engaged in "harvesting" an agricultural commodity (poultry) on a farm, and in preparing and delivering that commodity to storage or market. Even though they are not employed by the farmer who owns the particular farm, they are exempt under Section 3(f).

The Board has attempted to sweep away this legislative history by contending that Senator McGill's amendment was intended to cover only the narrow situation of "employees of specialized independent contractors, such as an employee who hauls his threshing machine 'from farm to farm' and who 'makes a business of doing nothing but threshing.'" NLRB Opp. at 24 (quoting *Farmers Reservoir*, 337 U.S. at 766-767 & n.16). That crabbed reading is directly contrary to the statutory language and the expressed intent of Congress. As noted, although specific examples were used during the debate, the amendment was intended to apply broadly to "*any* commodity produced on a farm," to "*all* work done on a farm," and to "*all* labor performed in making the delivery to market." 81 Cong. Rec. 7888 (emphases supplied); *see also* 81 Cong. Rec. 7927-28. There is no indication that Congress intended to limit its amendment only to "specialized independent contractors," and, of course, no such limitation appears in the statute.

Nor would such a limitation make any sense. Under the Board's fanciful interpretation, petitioners' employees would be considered agricultural laborers if petitioners organized a separate company devoted to live-haul activities. It is precisely to avoid such arbitrariness that Congress properly focused the inquiry on the nature of the

particular employee's work rather than the nature of the employer. *See supra* at 13.[8]

Holding that petitioners' employees are agricultural laborers also comports with the policy of uniformity that underlies the agricultural exemption. This Court long ago rejected the notion that the exemption was intended only to benefit "traditional" farming enterprises, holding that the fact that a company's "size has permitted it to achieve an extraordinary degree of specialization should not deprive it of this exemption." *Maneja*, 349 U.S. at 263. *See also id.* at 261 ("We do not believe the Congress intended to deprive farmers having their own mills of the exemption it afforded farmers who do not."). Thus, in that case, the Court held that the exemption applied to the workers on a large corporate plantation who perform agricultural activities (including, for example, workers on a company railroad used to transport crops from the fields), regardless of the company's size and degree of specialization. The decision below, by contrast, holds that application of the agricultural exemption turns not on the activities performed by the employees in question, but rather on petitioners' status as vertically integrated poultry producers. The term agricultural laborer, however, cannot mean one thing when applied to an employee of a vertically integrated producer and another thing when applied to an employee of a different producer performing the identical activities. Rather, the Court should reaffirm the longstanding principle that the agricultural exemption applies uniformly to *all* employees performing similar

[8] In fact, the live-haul activities undertaken for NBC's members are often performed by independent contractors organized specifically to provide such services. Under the Board's reading of the statute and its legislative history, the employees of these companies would be exempt from the NLRA but petitioners' employees who perform the same activities would not. Such a distinction is completely irrational and is contrary to Congress' intent that all employees performing the same activities be treated alike, regardless of who employs them.

tasks, regardless of what other operations their employer may perform in other aspects of its business.

III. NO DEFERENCE IS OWED TO THE BOARD'S ERRONEOUS INTERPRETATION OF THE FLSA.

The majority of the Court of Appeals felt constrained to uphold the decision of the Board because it believed it was required to defer to the Board's construction of the FLSA. *See* Pet. App. at A-52. That ruling was incorrect. As explained below, no deference is owed to the Board's erroneous interpretation of Section 3(f) for two different reasons.

First, as explained above, the Board's interpretation conflicts with the unambiguous language of the statute, as well as with the clear intent of Congress. *See also Coleman*, 629 F.2d at 1079 (conclusion that live-haul employees are agricultural laborers is dictated by "the plain language of the statute"). It is well-settled that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Thus, no amount of agency deference can lead to a reading contrary to a statute's plain language. *See, e.g., Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989); *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). Moreover, in determining whether Congress' intent is clear, the Court looks to the language and design of the statute as a whole, including legislative history where appropriate. *McCarthy* v. *Bronson*, 500 U.S. 136, 139 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1990); *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 529-531 (1983).

Here, as explained above, Congress' intent is absolutely clear. The plain language of the statute is unambiguous

and leaves no doubt that petitioners' live-haul employees are agricultural laborers. Moreover, the legislative history demonstrates that the relevant language of Section 3(f) was enacted to address the precise situation presented in this case. Accordingly, the Board exceeded its lawful authority in adopting a statutory construction at odds with Congress' clearly expressed intent, and that erroneous interpretation is entitled to no degree of deference.

Second, deference is in any event appropriate only for "an executive department's construction of a statutory scheme *it is entrusted to administer.*" *Chevron*, 467 U.S. at 844 (emphasis supplied). Thus, it is well-settled that no degree of deference is warranted where, as here, an agency has interpreted a statute entrusted to the administration of a different agency. *See Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991) (deferring to Secretary of Labor's statutory interpretation over contrary interpretation of different agency, where Congress entrusted primary administration of statute to the Secretary).[9]

This case turns not on the interpretation of any specific language in the NLRA itself, but rather on an interpretation of another statutory provision, Section 3(f) of the FLSA, which is administered by the Department of Labor. Thus, the specific statutory provision at issue in this case has not been entrusted to the Board to administer, but rather falls within the purview of the Secretary of Labor.

In *Bayside*, the Court did not need to address the question of whether the Board's or the Secretary of Labor's

[9] *See also Association of Amer. Physicians & Surgeons* v. *Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993); *American Fed. of Government Employees, AFL-CIO, Local 3854* v. *FLRA*, 930 F.2d 1315, 1324 n.12 (8th Cir. 1991); *Department of the Navy* v. *FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988); *California Nat'l Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *Division of Military and Naval Affairs* v. *FLRA*, 683 F.2d 45, 48 (2d Cir. 1982), *cert. denied*, 464 U.S. 1007 (1983); *Tsosie* v. *Califano*, 651 F.2d 719, 722 (10th Cir. 1981).

interpretation of Section 3(f) was entitled to deference, because the Court found that the Board's reasoning was fully consistent with the Secretary of Labor's construction of the statute. *See Bayside*, 429 U.S. at 303 & n.13. Here, however, the Secretary of Labor has taken the *opposite* view from the Board. The Secretary of Labor has issued a definitive interpretation of Section 3(f) as it applies to contractual arrangements between poultry feed dealers or processors and the independent farmers who raise their chickens. Under that longstanding interpretation:

> Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture. [29 C.F.R. § 780.126 (citing 29 C.F.R. § 780.137 *et seq.* and *Johnston* v. *Cotton Producers Ass'n*, 244 F.2d 553 (5th Cir. 1957)).[10]]

The Secretary has also stated that "employees engaged in inspecting and culling flocks of poultry" are exempt under Section 3(f) because their activities are performed "on a farm," regardless of whether they are employed by the farmer, and that the statutory term "preparation for market" specifically includes such activities as the "[c]ulling, grading, cooping and loading" of poultry. *See* 29 C.F.R. §§ 780.136, 780.151(k), 780.158(b).

These regulations make clear that, according to the Secretary of Labor, an employee who engages in the culling, cooping and loading of chickens on a farm is an agricultural employee regardless of whether the employee

[10] *Johnston* involved an employee of a feed dealer that, like petitioners in this case, contracted with independent farmers to raise chickens for the dealer. The court held that the employee, who engaged in the activities of "catching, cooping and loading of chickens on the growers' farms" was an agricultural employee under Section 3(f). 244 F.2d at 554-555. The holding in *Johnston*, embraced by the Secretary of Labor, is precisely the holding advocated by petitioners here.

works for the owner of the farm or for someone else. Thus, although no deference is warranted to any agency interpretation given the clarity of the statute, if the Court nevertheless concludes that some deference is appropriate it should defer to the interpretation of the Department of Labor—the agency entrusted to administer the particular provision at issue here—rather than to the contrary interpretation of the Board.[11]

CONCLUSION

For the foregoing reasons, and those set forth in petitioners' brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[11] Even if the Court determines that some amount of deference is owed to the Board's interpretation of Section 3(f) of the FLSA, the Court should nevertheless reject that interpretation, because (for the reasons set forth above) it does not represent a "'*reasonable* accommodation of conflicting policies that were committed to the agency's care by the statute * * *.'" *Chevron*, 467 U.S. at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)) (emphasis supplied).